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FEDERAL CENTRALIZATION

A Study and Criticism of the Expanding
Scope of Congressional Legislation

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To
MY FATHER

PREFACE

THIS study was begun several years ago as a legal treatise on the police power of the federal government. After the study was well under way, other duties became more pressing and I had to discontinue the work for a number of years. In the meantime studies by others were published, notably the articles by Professor Cushman which appeared in the *Minnesota Law Review* in 1920. These studies were somewhat similar in scope and character to the work which I had originally contemplated. After resuming the work, however, it appeared evident to me that centralization is more than merely a problem in constitutional law. Social, economic, and psychological factors, as well as legal, must be considered in attempting to find a workable division of functions between the federal government and the states. The scope of the book was therefore enlarged and additional chapters added. The result is that there is less continuity of thought than there would have been if the work had been limited to a legal treatise, but it is hoped that this loss of continuity is compensated in a measure at least by making the book more suggestive and stimulating.

Throughout the study I have endeavored to get away from the polemic spirit in which too frequently the subject of federal control and states rights has been discussed and to approach in a scientific spirit the problem of the extent to which the federal government has gone in regulating matters formerly left with the states, the methods employed in extending federal control, and the inherent limitations to centralization. It is not to be expected that the subject of centralization can be

adequately treated in a single volume. The present study deals with the expanding activities of the federal government. I have sought, first, to point out the constitutional bases for such an expansion, secondly, to show how federal regulation has been extended into the field of social and economic legislation, and thirdly, to account for the tendency to centralize governmental functions and to indicate some of the problems attending a policy of centralization. Few solutions have been offered. Sometimes the beaten trail has led me into unexplored territory. Some portions of the work are speculative. However, the book is offered in the spirit that it may stimulate abler minds than mine to grapple with the problem of finding a more accurate delineation between federal functions and state functions.

I have drawn freely from the works of others in preparing some of the chapters. An attempt has been made to give credit where credit is due, but this has not always been possible. I am especially indebted to my colleagues, Professor Arnold B. Hall and Professor Pitman B. Potter, of the University of Wisconsin, both of whom have read portions of the manuscript and offered valuable criticisms, and to Miss Rose Hargrave, who has read the entire manuscript and given me many suggestions for improving the style and form. My students at the University of Wisconsin and many friends have given me aid and encouragement. Errors, both as to facts and conclusions, are bound to be present in a detailed study such as this. I alone am responsible for these.

WALTER THOMPSON

The "Orphanage"
Hibbing, Minnesota
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PART I
CONSTITUTIONAL BASIS FOR FEDERAL
POLICE POWER

CHAPTER I

INTRODUCTION

GOVERNMENT in the United States has been, and, so long as our constitutional system is retained, will probably continue to be an experiment in federalism. In fact, every federal state is an experiment. Federalism, by its very nature, necessitates constant adjustment of governmental functions between the central government on the one hand and the integral federated units on the other. It is always difficult, perhaps impossible, to draw a fixed line delineating the respective functions of the central agency and the local units. Hence the experimentation and the tendencies to adjust and to readjust governmental functions in federal systems of government.

The problem of division of powers in federal states is not merely a philosophical question to engage the attention of academic students of government. Neither is it mainly a question of constitutional law or statutory construction. It is a practical rather than a philosophical question. The very life of a federal system depends upon a workable adjustment of the powers and functions of the central agency and the component local units. If the states are exercising powers in such a manner as to impede the proper functioning of the general government, the federal system is in danger of disintegration. If the central government, on the other hand, interferes with the free exercise of those powers which inherently and constitutionally belong to the states, there is a dan-

ger of the states being absorbed into a strongly centralized system which is federal in name only.

While the problem of division of powers and functions between the states and the national government is a practical one which involves mainly a consideration of a reasonable division of governmental functions between the central agency and the component parts, this view of the question has often been confused, especially in the United States, by the more academic question of where sovereignty is vested. The word "sovereignty" has been one to conjure with. This has probably been due to sentimental rather than to practical reasons. Sovereignty denotes independence, final authority, and supremacy, and these are attributes with which a citizen loves to vest the state to which he feels that he owes allegiance. The word, therefore, makes an emotional appeal. A great deal of the argument for and against the idea that sovereignty was vested in the states was probably in the nature of rationalization to justify emotional reactions. On the one side there was a pride in the "sovereign state"; on the other, a pride in "the Union one and inseparable." These were phrases to rally around. It is not to be expected that the prosaic question of whether or not certain specific governmental functions can be performed more satisfactorily by the states or the national government will arouse the same enthusiasm that the question of the location of sovereignty provoked. Human nature is so constituted that the average individual reacts to an emotional rather than to a rational appeal. Still the question of a feasible division of governmental functions presents a problem which, while less controversial, is not less important than the question of the location of sovereign power.

The much debated legal question of the location of sovereignty presents itself in every consideration of the American constitutional system. The present study is an attempt to inquire into the tendency of the federal government to extend its activities. It is not intended as a brief either for or against federal usurpation. Consequently the question of sovereignty need not be given the intensive consideration it receives in studies purporting to condemn or justify federal or state action. However, due to the intense interest which the question has aroused in the past, it merits at least a brief consideration here.

The fathers of the Constitution wisely refrained from including in that document a statement about the location of sovereignty. It is hardly conceivable that members of the constitutional convention, like Madison or Hamilton, should have been unmindful of this omission. But the preservation of a central government of any kind was hanging in the balance and it would not have been expedient to have pressed the question in the convention. Any implication that the sovereignty of the states would be impaired would have prejudiced the ratifying conventions and jeopardized the chances of ratification. The question was therefore glossed over. Could a state withdraw from the Union? The Constitution was silent on this point. The Articles of Confederation contained provisions that the Union should be permanent, but such provisions found no place in the new constitution. Neither was the "sovereignty" of the states either expressly denied or affirmed. The question of where sovereignty was placed was a delicate matter and the framers evidently did not wish to jeopardize their work by forcing a decision when the matter could be passed over in silence.

The fathers evidently were not entirely clear on where sovereignty had been placed by the new constitution. Hamilton, while admitting that the Constitution limited the powers of both the general government and the states, argued that the ultimate authority, wherever the derivative may be found, resides in the people. But he refrained from saying whether the "people" meant the people of the several states or of all the states considered collectively. The theory of a divided sovereignty was apparently accepted by the framers and early defenders of the Constitution. Madison maintained that "It is difficult to argue intelligibly concerning the compound system of government in the United States without admitting the divisibility of sovereignty."¹ To him it appeared that the government created by the Constitution was neither federal nor national; it was a "system hitherto without a model,"² "a nondescript to be tested and explained by itself alone."³ What seemed consequential to the early defenders of the Constitution was that popular sovereignty, as opposed to governmental sovereignty, had been established. When the vexatious question was raised as to where the ultimate power was located they answered, "with the people," without attempting to explain just what was meant by this phrase.

The theory of divided sovereignty continued to be placidly accepted during the early decades of the Republic. Publicists adhered to it; foreign critics accepted it;⁴ and the Supreme Court spoke of the "sovereignty"

¹ *Letters and Other Writings of James Madison*, 4 vols., Philadelphia, 1865, IV, p. 394. It should be noted that this was written at the close of Madison's career and after nullification had become an issue.

² *Ibid.*, 420-21.

³ *Ibid.*, 420-21.

⁴ See Alexis De Tocqueville, *La Démocratie en Amérique*, 2 vols., Paris, 1835.

of the Union and the "sovereignty" of the several states.⁵ Not until the great political philosopher of the South, John C. Calhoun, with relentless logic, began to attack this view was the theory of divisibility of sovereignty seriously challenged. Calhoun maintained that sovereignty, by its very nature, was indivisible; that it had been secured by the several states when they gained their independence from Great Britain; that these sovereign states had not divested themselves of sovereignty when they entered into the compact under the Articles or under the Constitution; and that consequently it was within the powers of the sovereign states to withdraw from the Union if they found it disadvantageous to remain.⁶

The argument of Calhoun was a challenge to the nationalist school. It called for a rational rebuttal. This necessitated a clarification of thinking on the subject of the location of sovereignty. The nationalists found their ablest exponent in Daniel Webster. This school admitted the contention of Calhoun that sovereignty was indivisible but maintained that the Union was not a compact of individual states but of the people of the states taken collectively. There was one body politic held together by social, economic, and political ties which no individual state could sever. Webster relied mainly on legal argument and sought to expound the Constitution.⁷

⁵ *Chisholm v. Georgia*, 1792, 2 Dall. 419.

⁶ This is, of course, a bald statement of Calhoun's views. His ideas are most systematically expressed in *A Disquisition on Government* and *A Discourse on the Constitution and Government of the United States*. These taken together comprise one of the ablest of American treatises on government and in these, together with numerous speeches and a voluminous correspondence, Calhoun lays the foundation for his views on nullification and secession. See *Works*, Ed. by Richard K. Crolle, 6 vols., New York, 1833.

⁷ See *Works of Daniel Webster*, 6 vols., Boston, 1851. Reply to Calhoun (1833), III, p. 468.

However, when the issue threatened to disrupt the Union the nationalists following Webster took the view that the Union must be saved at all hazards, constitutionally or unconstitutionally.

As in Germany and Italy, the fact of national unity in the United States was not settled on the merits of the claims of these conflicting schools of political thought. As in those countries, it was settled, during the same decade, by "blood and iron." After the Civil War, whatever the merits of the arguments of the particularists might have been, it was agreed that sovereignty is vested in the people of the United States as a whole, and not in the individual states or in the people of the individual states. The exercise of sovereignty, however, is conceded to be divided, the national government having final authority in some things and the states having final authority in others.⁸

The Civil War silenced the arguments regarding the location of sovereignty in our system of government. These academic arguments, however, were in the nature of rationalizations to justify certain reactions towards the exercise of governmental functions by the central government and the states. The reactions were of greater moment than the rationalizing discourse, because they resulted from actual circumstances. The growth of the United States had made possible a situation where the people of one section could impose their ideals regarding the institution of slavery upon an irreconcilable minority residing in another section and living under different conditions. The abolitionist movement in the

⁸ For a résumé of the political theory of the Union, see Charles Edward Merriam, *A History of American Political Theories*, New York, 1903, Chap. VII.

North threatened to make such a situation, not only possible, but probable. There was thus a danger of a relentless majority tyrannizing over an irreconcilable minority—a danger which Calhoun recognized and which undoubtedly was a factor in determining his political speculations. Numerous treatises have been devoted to a consideration of the merits of the arguments of the particularistic and nationalistic schools on the nature of the Union. The social, economic, and psychological factors which tended to create the difference in viewpoint of these two schools have, on the other hand, received too scant attention. Yet it is from a contemplation of these factors, rather than from the theories of the champions of the conflicting schools of political thought that the real lessons in government may be learned. The discourses on sovereignty preceding the Civil War were aimed to justify or condemn the conflicting views on nullification and secession. The war settled this controversy, and at all events a state cannot nullify a federal law or secede from the Union. A union was thereby firmly established. But the question of a wise division of governmental functions between the central government and the states was not a question that could be settled by the outcome of an armed conflict. This question has always presented itself and probably will continue to present itself so long as our federal system endures.

Since the Civil War there has been a marked tendency for the federal government to increase its activities. This has been especially notable during the last two decades. Because of this increased activity of the national government the subject of federal expansion has provoked considerable discussion during the last few years. Not only has it occupied the attention of men

possessed of a sentimental regard for "states rights," but it has come up for consideration by deliberate scholars and jurists as well as by able statesmen.

In an address before the American Bar Association in 1918 Mr. Hughes pointed out that "The more important decisions of the past year, as might have been expected, have dealt with questions touching the regulations of interstate commerce. And the significance of these decisions may be found in (1) the extended application of the doctrine that federal rules governing interstate commerce may have the quality of police regulations; (2) the approval of the coöperation of nation and states through the virtual adoption of state laws in an important class of transactions as the standard of conduct with respect to interstate commerce; and (3) the recognition of the sweeping authority of Congress over the relations between interstate common carriers and their employees."⁹ This expansion of the national government was considered by Mr. Hughes as a natural development and outgrowth of modern industry. He noted also that it would be one of the features of the era of reconstruction following the world war.

A careful student of government, like Professor Freund, looks upon centralization of political authority in the United States as inevitable. In considering the question of federalism he is led to remark that "The consolidation of our own nation has proved our allotment of federal powers to be increasingly inadequate; and had it not been aided by liberal judicial construction, our situation would be unbearable."¹⁰ Professor Freund, in the

⁹ Charles E. Hughes, "New Phases of National Development," in *American Bar Association Journal*, IV (1918), pp. 93-94.

¹⁰ Ernst Freund, "The New German Constitution," in *Political Science Quarterly*, XXXV (1920), p. 181.

same article, considers the federal system established under the new Constitution in Germany and draws a lesson from the unitary system established there. He notes that "Germany will be far less federal in its organization than the United States. This development cannot be a matter of indifference to us. We may look with considerable detachment upon the evolution of readjustment of territorial divisions; that matter is not yet felt to be a problem in the United States; there is no active political feeling about the disparity of Rhode Island and Texas or New York and Nevada, even though it may produce peculiar results in our foreign relations. But the distribution of powers is a different matter. We live under an antiquated and intolerable system of apportionment, and if we have to contemplate a change, we may as well make up our minds that progress toward the unitary state is not an accident but a logical development, once national unity has been attained. The system of concurrence of powers subject to national supremacy is the one to which the future belongs. States will have to be content with what cities enjoy under constitutional home rule."¹¹

But while federal expansion is considered as a natural development, centralization of governmental authority has been viewed with apprehension by many of our ablest men. It is a familiar fact that the "states rights" school of political thought has opposed the expansion of federal activities since the days of Thomas Jefferson. There are, of course, still a considerable number, notably in the South, who adhere to this school of political thought and who for historical and sentimental

¹¹ Ernst Freund, "The New German Constitution," in *Political Science Quarterly*, XXXV (1920), pp. 183-184.

reasons magnify the powers of the "Sovereign States" and decry the encroachment of the federal government upon the powers of the states.¹² However, there are many careful students of government who, while apparently uninfluenced by the fetish of states rights, consider our dual system of government the only feasible system in a country like the United States and look upon any invasion of the jurisdiction of the states by the federal government as being impolitic and unwise. The President of the American Bar Association in the Annual Address in 1907 devoted most of his time to praise of the dual system and warned against such invasion of states' authority as that contemplated by the first federal Child Labor Law.¹³ In an address before the Graduating Class of the Law School of Yale University, Senator Knox considered the power under the commerce clause as an affirmative and constructive national power, but maintained that the exercise of such a power should be circumscribed. "In my judgment," he said, "the power to regulate commerce between the States does not carry with it the power to prohibit commerce, unless the prohibition has for its purpose the facilitation, safety or

¹² See Seymour D. Thompson, "Encroachment of Federal upon State Authority," Annual Address, in *Proceedings Alabama State Bar Association* (1890), p. 87; Seymour D. Thompson, "Limitations on Power of States to Regulate Railroad Charges" in *American Law Review*, XXXII, p. 446; J. Randolph Tucker, "Constitutional System in the United States" (Paper), in *Proceedings Miss. Bar Assn.* (1889), p. 38; J. Randolph Tucker, "Congressional Power over Commerce among the States" (Paper), in *Proceedings American Bar Association* (1888), p. 247; H. M. Cox, "Passing of State Autonomy," in *Central Law Journal*, LXVII (1908), p. 275; William J. Bryan, "Is There a Twilight Zone Between the Nation and the State?" in *Central Law Journal*, LXVII (1908), p. 273; F. L. Smith, "Expansion of Federal Power," in *Virginia Law Register*, XVII (1911), pp. 337-352.

¹³ Alton B. Parker, "President's Annual Address before the American Bar Association," in *Green Bag*, XIX (1907), pp. 581-593.

protection of commercial intercourse, or the accomplishment of some other national purpose.”¹⁴ It would be difficult to state the case for our dual system more emphatically than has been done by Chief Justice Taft. In discussing the importance of maintaining the constitutional autonomy of the states, he declares: “Our Federal system is the only form of popular government that would be possible in a country like ours, with an enormous territory and 100,000,000 population. There is a great homogeneity among the people, greater indeed than many of us suppose, but, on the other hand, not only the mere geographical differences, but the differing interests of the people in different localities, require that a certain part of their government should be clearly within their own local control and not subject to the interference of people living at a great distance from them. But for this safety valve by which people of one state can have such State government as they choose, we would never be able to keep the union of all the people so harmonious as we now have.”¹⁵

The literature on the question of division of powers in the United States has, in the main, been of a legal nature. The question is one which logically confronts the student of constitutional law, and also frequently presents itself to the attention of the courts. A federal system must be based upon certain principles and rules and these demand interpretation by courts and jurists. It would be difficult, if not impossible, for a federal system to operate without some judicial tribunal to determine the delineations between the powers and functions

¹⁴ Philander C. Knox, “The Development of the Federal Power to Regulate Commerce,” in *Yale Law Journal*, XVII (1908), p. 146.

¹⁵ W. H. Taft, *Popular Government* (New Haven, 1913), p. 145.

of the central agency and the states. The legal side of the question is of tremendous importance. Reformers are apt to become impatient with the progress of their reforms in the states and endeavor to find a short cut by having the federal government carry out the desired program. It is easier to convince one government than to convince forty-eight governments that a reform is desirable. The results are greater in proportion to the efforts expended. Consequently the national government is constantly beseeched to enlarge its activities. Frequently constitutional limitations are ignored and a court which seeks to defend the Constitution is stigmatized as reactionary. It is argued that where the states have signally failed properly to exercise the powers reserved to them the federal government should assume the responsibility. However, it cannot be emphasized too strongly that the very life of a federal system of government depends upon the recognition of certain fundamental rules and principles by which the respective spheres of activity of the central government and the states are delineated. It is interesting to note that while the national government does not always pursue the desired course in the exercise of one of its powers, as for instance the treaty power, it is never suggested that this power should be taken away from it and vested in the states. Still, such a suggestion, however absurd it may seem, would be as logical as a proposal that the national government should exercise powers never delegated to it because the states have been tardy and negligent in exercising those powers which are reserved exclusively to them by the Constitution.

The question of centralization, however, is more than a mere legal question. Centralization may be perfectly

legal and yet the wisdom of such a policy may be open to question. National prohibition may be cited by way of illustration. The Eighteenth Amendment and the legislation pursuant to it are certainly legal, but this does not prove that it was wise to impose the burden of enforcement of prohibition upon the federal government. Unquestionably an amendment to the Constitution purporting to abolish child labor could legally be adopted. But such an action would not prove that it is wise for the federal government, already burdened with many duties which inherently belong to it and which cannot be left to the jurisdiction of the states, to assume this new responsibility. It is more important to consider the wisdom of centralization than it is to consider merely the legality of increasing federal control.

Cases involved in the question of conflicting jurisdictions have frequently presented themselves to the courts. As a result the courts have established certain legal and constitutional demarcations between the powers of the national government and those of the states. These demarcations have not always been definite but have served in a measure to delineate federal and state powers. This delineation, however, has been based solely upon constitutional interpretation. Practically nothing has been done to determine what functions should naturally and inherently be performed by the federal government and what could more satisfactorily be performed by the states. This involves more than problems of constitutional construction. It involves a consideration of social, economic, and psychological factors. It involves a consideration of the part that public opinion plays in government. It involves a consideration of human nature and human conduct. To what extent shall the federal

government go in regulating human conduct? What activities should be subject to federal regulation, and what should be left to state and local regulation? These are questions far more difficult than the interpretation of the Tenth Amendment, and yet they are of such importance that they must constantly be borne in mind if one is to make a study of the centralizing tendencies in our governmental system.

Until comparatively recently Congress had enacted few measures which were in the nature of police regulations. Within the last generation Congress has regulated corporations, railroads, and labor; it has promoted good roads; it has fostered education; it has sought to protect public health by providing for scientific research, making money grants, and regulating the transportation and sale of food and drugs; it has sought to improve public morals by regulating intoxicating liquor, vice, lotteries, and fight films. It should be observed that the states likewise have regulated such activities. In most instances the federal and state regulations have supplemented one another. In some cases the respective regulations have conflicted.

By way of introduction here it might be well to notice in what ways the federal government has assumed new functions. These fall roughly into three classes. In the first place, Congress has exercised certain powers conferred upon it by the Constitution in a manner not sanctioned by tradition and with the result that it has thus regulated matters which formerly were regulated only by the states. For instance, under its power to regulate interstate commerce it has forbidden the transportation in interstate commerce of articles deemed injurious to public health or public morals. Congress has thus indi-

rectly sought to effect police regulations by the exercise of a constitutionally granted power. The second way in which the federal government has increased its activities is by directly engaging in functions, not prescribed by the Constitution, but deemed necessary to public welfare. The experimentation and the gathering and dissemination of useful information conducted by such federal agencies as the Department of Agriculture are examples. The third method by which the central government has increased its control in matters formerly left exclusively to the states is by seeking to coöperate with the states in the promotion of certain interests by the extension of financial aid to the states. Legislation granting funds for educational purposes may be cited as an illustration of this. These different methods of increasing federal control are considered in succeeding chapters.

The present study divides itself logically into three parts. In the first place, an attempt is made to inquire into the nature of our constitutional system. This involves a consideration of the type of government contemplated by the framers of the Constitution and of such constitutional provisions as the commerce clause, the taxing clause, and the postal clause which have vested great powers in the federal government and have served as constitutional justifications for the expansion of federal activities. Secondly, an attempt is made to indicate to what extent the federal government, in the exercise of powers vested in it by the Constitution, has gone in the field of social and economic legislation in regulating matters pertaining to public welfare. Finally, by way of a conclusion, an attempt is made to account for the phenomenon of federal expansion and to indicate some

of the constitutional and inherent limitations to federal centralization.

It is not to be expected that such a study can be complete in all the details. Volumes have been written on the commerce clause alone. The same is true for the treaty power. A large part of the federal legislation bearing on the subject has to be passed over hurriedly and some of it omitted entirely. Only a few of the court decisions can be considered. However, it is hoped that some of the more general phases of federal expansion may be pointed out and that such a study may be of some value to students of our governmental system.

CHAPTER II

THE GOVERNMENT CONTEMPLATED BY THE FATHERS

THE Constitutional Convention of 1787 had a two-fold function to perform. In the first place, it devised a framework of government, providing for the different departments and prescribing their duties. In the second place, it vested certain powers in this central government which it sought to establish. The framers of the Constitution devoted most of their time to the former. In considering the latter more attention was devoted to the representation of the states in the central government than to a consideration of the actual powers that should be given to the new government. However, every plan submitted to the convention contained some statement regarding the powers to be exercised by the federal government.

The resolution offered by Edmund Randolph, which became the basis for discussion in the convention, contained the following:

Resolved, That each branch ought to possess the right of originating acts; that the national legislature ought to be empowered to enjoy the legislative right vested in Congress, by the Confederation; and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the union; and to call forth

the force of the union against any member of the union failing to fulfill its duty under the articles thereof.¹

The draft of a federal government offered by Charles Pinckney contained a similar provision:

All acts made by the legislature of the United States, pursuant to this constitution, and all treaties made under the authority of the United States, shall be the supreme law of the land; and all judges shall be bound to consider them as such in their decisions.²

Mr. Patterson, in his propositions submitted to the convention, stated essentially the same principle as Mr. Pinckney, but went on to emphasize the element of coercion in even stronger terms than did Mr. Randolph:

And if any state, or any body of men in any state, shall oppose or prevent the carrying into execution such acts or treaties, the federal executive shall be authorized to call forth the powers of the confederate states, or so much thereof as may be necessary, to enforce and compel an obedience to such acts.³

The most drastic statement of federal supremacy is contained in the plan submitted by Alexander Hamilton:

All laws of the particular states, contrary to the constitution or laws of the United States, to be utterly void. And the better to prevent such laws being passed, the governor or president of each state shall be appointed by the general government, and shall have a negative upon the laws about to be passed in the states of which he is governor, or president.⁴

¹ *Journal, Acts and Proceedings of the Federal Convention of 1787* (Boston, 1819), May 29, 1787, p. 68.

² *Ibid.*, May 29, 1787, p. 77.

³ *Ibid.*, June 15, 1787, p. 126.

⁴ *Ibid.*, June 18, 1787, p. 132. For Hamilton's discussion of his proposed plan of government see "Madison's Debates" for the same

These proposals and the debates which followed indicate that the framers of the Constitution had no intention of establishing a system in which the states could interfere with the functions of the central government. The experience under the Articles of Confederation had brought home the lesson that federal supremacy was the only safeguard for a free and effective exercise of the powers vested in the federal government. It was the intention of the framers to establish a governmental system in which the central government should be supreme in its sphere. But this sphere of the federal government had to be defined and its supremacy established. Moreover, this had to be done in such a manner that it would not be offensive to the states, in which case the chances for ratification would have been jeopardized. For this reason such express provisions as coercion by the federal government and the power to negative state laws were abandoned. There were also a considerable number in the convention who feared that the government would not remain within its given powers and who wished to circumscribe those powers by providing for a bill of rights.

A provision in the Constitution for coercion by the federal government naturally would have been a means of establishing supremacy, but it would have delayed ratification. The last clause of Mr. Randolph's resolution contained such a provision. This clause did not get far in the convention. On May 31 the rest of the resolution was affirmed by the convention but this last clause was postponed.⁵ When the resolution was resubmitted

date, *Madison Papers*, published under the superintendence of Henry D. Gilpin (3 vols., Washington, 1840), II, pp. 878 *et seq.*

⁵ See *Journal* for May 31, p. 87.

by Mr. Randolph on June 19th, the last clause was dropped and was not included in the resolutions referred to the Committee on Detail on July 23 and 26.⁶

The provision giving the federal government the power to negative state laws received more consideration. This was affirmed along with the rest of the resolution on May 31.⁷ On June 8 it was "moved by Mr. Pinckney, seconded by Mr. Madison, to strike out the following words in the sixth resolution adopted by the committee, namely, 'To negative all laws passed by the several states contravening, in the opinion of the national legislature, the articles of union, or any treaties subsisting under the authority of the union,' and to insert the following words in their place, namely, 'To negative all laws which to them shall appear improper.'"⁸ The *Journal* notes that "on the question to strike out it passed in the negative" and that only three states voted for it.⁹ Again on June 19, in the sixth of the resolutions submitted to the consideration of the convention by Mr. Randolph, "as altered, amended, and agreed to, in committee of the whole House," is found the right of the national legislature to negative state laws.¹⁰ On July 17 this question came up for a spirited debate in the convention. Mr. Madison favored vesting such a power in the central government because he wished to give it control and he thought that if it did not have the power to negative state laws it could not exercise the proper control over the states.¹¹ Luther

⁶ See *Journal* for June 19, p. 136, and July 26, pp. 208-209.

⁷ See *Journal*, May 31, p. 87.

⁸ *Journal*, June 8, p. 107.

⁹ *Ibid.*

¹⁰ *Journal*, June 10, p. 136.

¹¹ "Madison's Debates for July 17, 1787," *Madison Papers*, II, p.

Martin doubted the wisdom of such a provision and asked if the laws of the states should "be sent to the General Legislature before permitted to operate."¹² Mr. Sherman did not think it was necessary to give this power to the federal government and concluded that "Such a power involves a wrong principle, to-wit, that a law of a state contrary to the Articles of Union would, if not negatived, be valid and operative."¹³ Gouverneur Morris opposed this power "as likely to be terrible to the States, and not necessary if sufficient Legislative authority should be given the General Government."¹⁴ He also considered it impolitic in that such a proposal "would disgust all States."¹⁵ When the question of giving the federal government this power was put to a vote, it was lost, only three states voting for it.¹⁶

After the motion to give the national legislature the power to negative state laws had been voted down, Luther Martin moved that the convention agree on the following resolution:

Resolved, That the legislative acts of the United States, made by virtue and in pursuance of the articles of union, and all the treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts, or treaties, shall relate to the said states, or their citizens and inhabitants: — and that the judiciaries of the several states shall be bound thereby in their decisions — anything in the respective laws of the individual states to the contrary notwithstanding.¹⁷

¹² "Madison's Debates for July 17, 1787," *Madison Papers*, II, p. 1117.

¹³ *Ibid.*, pp. 1117, 1118.

¹⁴ *Ibid.*, p. 1117.

¹⁵ *Ibid.*, p. 1118.

¹⁶ *Journal*, July 17, p. 183.

¹⁷ *Journal*, July 17, p. 183. It should be noted that while this resolution was presented by Luther Martin it contains practically the same provisions as those suggested in the Pinckney draft.

This resolution received the unanimous approval of the convention.

In rejecting the proposal to give the national legislature power to negative state laws and in adopting Luther Martin's resolution, the convention displayed statesmanship. This action is an illustration of the spirit which animated the framers of the Constitution. These men were anxious to establish a strong central government which would be free from interference by the states, but in doing this they did not wish to offend the states and thus jeopardize the chances of having the Constitution ratified. By rejecting the proposal giving the national legislature the power to negative state laws they removed a clause which would have been offensive to the states. By adopting Luther Martin's resolution they accepted a positive declaration of the supremacy of the federal government with respect to its legislation. It is interesting to observe that the power to negative state laws still rested logically with the federal government, but instead of being exercised by Congress it has come to be exercised by the courts. Mr. Madison, who had championed the right to negative state laws as a means of securing federal control, was satisfied that the same thing had been accomplished by putting it in the form of Mr. Martin's resolution.¹⁸

But if it was the intention of the framers of the Constitution to establish federal supremacy, it is also evident that they intended that such supremacy should exist within a limited sphere. The proposal of Alexander Hamilton to create a legislature "with power to pass all laws whatsoever"¹⁹ never came up for debate in the

¹⁸ "Madison's Debates, July 17, 1787," *Madison Papers*, II, p. 1119.

¹⁹ *Journal*, June 18, p. 130.

convention. In the other resolutions the idea of a central government with enumerated powers to be exercised within constitutional limitations is implied. This is shown by the proposals offered by Mr. Patterson. In his statement of the supremacy of federal laws Mr. Patterson uses the phrase, "all acts of the United States in Congress assembled, made by virtue and in pursuance of the powers hereby vested in them."²⁰ In Charles Pinckney's Draft of a federal government similar language is used, "all acts made by the legislature of the United States, pursuant to this constitution."²¹ Mr. Pinckney also went on to enumerate the powers to be exercised by the federal legislature, and most of the powers enumerated in his draft were later embodied in the Constitution. The procedure in the convention also indicated that it was the intention to establish a government of enumerated powers. In considering the powers to be granted to Congress each clause was taken up separately and the wisdom of granting the power was debated.

However, even in the convention there were those who feared that the central government might overstep its enumerated powers. On July 17 Mr. Sherman offered a resolution to give the national legislature power "To make all laws binding on the people of the United States in all cases which may concern the common interests of the union; but not to interfere with the government of the individual states in any matters of internal police, which respect the government of such states only, and wherein the general welfare of the United States is not concerned."²² This proposal did not receive favorable

²⁰ *Journal*, June 15, p. 126, italics mine.

²¹ *Ibid.*, May 29, p. 77, italics mine.

²² *Ibid.*, July 17, p. 182.

consideration in the convention. Gouverneur Morris opposed it on the grounds that the internal police of the states ought to be infringed in many cases "as in the case of paper money, and other tricks by which citizens of other states may be affected."²³ On the question to postpone the business before the convention in order to take up Mr. Sherman's resolution, the motion was lost, only two states voting for it.²⁴

The demand for a bill of rights also indicates a desire in the convention to circumscribe the powers of the federal government. During the progress of the convention certain provisions in the nature of a bill of rights were inserted in the resolutions and Congress was prohibited from passing any bill of attainder or *ex post facto* law, and the writ of habeas corpus could not be suspended except in case of rebellion or invasion when the public safety might require it.²⁵ On September 12, after the revised draft of the Constitution had been reported out of committee, it was proposed to appoint a committee to prepare a bill of rights. The vote on this motion shows that there was a considerable number in the convention who did not think it impossible for the federal government to go beyond its enumerated powers and infringe upon individual rights, and who wished to make those rights doubly secure by attaching a bill of rights to the Constitution. On the motion to appoint a committee for this purpose the vote stood five for and five against, one state, Massachusetts, being absent.²⁶ Again on Septem-

²³ "Madison's Debates, July 17, 1787," *Madison Papers*, II, p. 1115.

²⁴ *Journal*, July 17, 1787, p. 182.

²⁵ *Constitution*, Art. I, sec. 9:2, 3.

²⁶ The *Journal of the Convention* and Madison's record do not agree on this point. The *Journal* for September 12 contains the following: "It was moved and seconded to appoint a committee to prepare

ber 14, on the question to insert "the liberty of the press shall be inviolably preserved," the motion was lost by the narrow majority of six to five.²⁷

The apprehension that the federal government might extend its activities beyond its granted powers is shown clearly in the attitude of the ratifying conventions of the states. These conventions not only sought to secure individual right against aggression on the part of the federal government, but also wanted an explicit statement in the Constitution to the effect that the central government was one of enumerated powers and that the powers not granted to it were reserved respectively to the several states, or to the people. The ratifying convention of Virginia proposed a bill of rights of twenty articles.²⁸ The action of the Virginia Convention was followed by the conventions of New York, North Carolina, and Rhode Island.²⁹ With reference to the powers vested in the

a bill of rights — which passed unanimously in the negative." P. 369. Madison comments on the question as follows: MR. GERRY . . . moved for a Committee to prepare a Bill of Rights.

COLONEL MASON seconded the motion.

MR. SHERMAN was for securing the rights of people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient. . . . The Legislature may be safely trusted.

COLONEL MASON. The laws of the United States are to be paramount to State Bills of Rights.

On the question for a Committee to prepare a Bill of Rights, — New Hampshire, Connecticut, New Jersey, Pennsylvania, Delaware, aye — 5;

Maryland, Virginia, North Carolina, South Carolina, Georgia, no — 5;

Massachusetts, Absent.

See *Madison Papers*, III, p. 1565.

²⁷ *Journal*, September 14, p. 377.

²⁸ For these provisions, see *Supplement to the Journal of the Federal Convention*, pp. 416-426.

²⁹ *Ibid.*, pp. 426-439, 439-499, 452-462. For the attitude of the ratifying conventions towards a Bill of Rights see: *Debates in the State*

federal government, the Convention in Massachusetts suggested "that it be explicitly declared that all powers not expressly delegated by the aforesaid constitution, are reserved to the several states to be by them exercised."³⁰ Six other states made similar suggestions.³¹ It is therefore clear that, while the federal government from the nature of its origin was a government of limited and enumerated powers, the people of the states were apprehensive and were not satisfied with anything less than an express assurance given in the Constitution itself.

But if there were doubts regarding the extent of the powers vested in the federal government, the writings of the early publicists and defenders of the Constitution certainly are clear on this point. Alexander Hamilton, discussing the necessity of a bill of rights, wrote,

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even

Conventions on the adoption of the Federal Constitution, edited by Jonathan Elliot (5 vols., Washington, 1830). *Debates in the Convention of Mass.*, 30 Jan., 1788, *Elliot Debates*, II, p. 124. *Debates in the Convention of N. Y.*, 7 July, 1788, II, p. 383. *Debates in the Convention of Pa.*, 28 Oct., 1787, II, p. 408; 4 Dec., 1787, II, p. 424; 11 Dec., 1787, II, p. 476. *Debates in the Convention of Va.*, 9 June, 1788, III, p. 196; 12 June, 1788, p. 302; 16 June, 1788, p. 409; 20 June, 1788, pp. 495, 509; 21 June, 1788, p. 520. *Debates in the Convention of N. C.*, 28 July, 1788, IV, pp. 154, 158; 29 July, 1788, IV, pp. 162, 168, 172, 181. *Address of Luther Martin to the Legislature of Maryland*, 27 Jan., 1788, *ibid.*, I, p. 428. *Letter of Elbridge Gerry to the Legislature of Mass.*, I, p. 532. *Objections of George Mason to the Constitution*, I, p. 533. *Amendments to the Journal of the Federal Convention*, pp. 402, 403, 413, 417, 426, 439, 453, 466. *The Federalist*, No. 84, edited by Paul Leicester Ford (New York, 1895), p. 573.

³⁰ *Supplement to the Journal of the Fed. Convention*, p. 402.

³¹ The suggestions of the states for a bill of rights and for a declaration in the Constitution securing to the states the powers not granted to the federal government by the Constitution were later embodied in the first ten amendments.

be dangerous. They would contain various exceptions to powers not granted; and, on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of authority which has not been given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for a bill of rights.³²

Discussing the constitutional basis of federal legislation, Hamilton said:

The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent

³² *The Federalist*, ed. by Paul Leicester Ford, New York, 1898, pp. 573, 574. The Ratifying Convention of Virginia sought to guard against the construction Hamilton suggests by proposing the following amendment: "That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution. *Supplement to the Journal of the Federal Convention*, p. 425.

in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State? ³³

Concerning the nature of the federal government and the powers reserved to the states, Hamilton commented as follows:

But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. ³⁴

Madison was equally convinced that the proposed government was one of delegated and defined powers. Considering the powers which he thought would be exercised by the federal government and by the several states, he said:

The powers delegated by the proposed Constitution to the federal governments are few and defined. Those which remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State. ³⁵

From this summary of our early constitutional history the following conclusions may reasonably be drawn:

³³ *The Federalist*, pp. 203-204.

³⁴ *Ibid.*, p. 198.

³⁵ *The Federalist*, p. 309.

(1) The framers of the Constitution intended to establish a government which should be supreme within its sphere of activity and which would not be embarrassed, in the exercise of its powers, by conflicting legislation on the part of the states.

(2) The federal government which they sought to establish was to be one of limited and granted powers, and the national supremacy was to be limited to the exercise of those powers expressly granted in the Constitution. Within the field where the federal government was empowered to legislate, its laws were to be supreme and all conflicting state legislation would have to yield, but the power to enact measures was limited to a comparatively few enumerated subjects. This grant of legislative power was not clothed in a general term, as in the case of the treaty power, but the subjects on which the federal government could legislate were specifically enumerated.

(3) Although the legislative activity of the federal government was intended to be limited to the subjects stipulated in the Constitution, there was a considerable number in the Convention who thought it possible that this government might go beyond its constitutional limitations and legislate on subjects other than those enumerated in the Constitution, and who, for this reason, wished to secure individual rights and the sovereignty of the states against federal aggression by expressly denying the central government the power to make regulations in certain specified cases. The desire for this additional security is more clearly shown in the ratifying conventions of the states, where it is indicated by these conventions asking that a bill of rights be inserted in the Constitution and that an amendment expressly declaring the federal government to be one of delegated powers be also added.

(4) That the federal government was to be one of enumerated and limited powers is clearly indicated by the writings of its defenders, such as Hamilton and Madison.

However, it is hardly necessary to go back to early documents to prove that the federal government is one of enumerated and restricted powers and that the powers not delegated to that government are reserved to the states. That fact is generally admitted and has repeatedly been affirmed by the courts. But some of the powers conferred upon the central government necessarily vest it with more authority than might appear at first glance and in the exercise of this authority the central government has seemed to encroach upon the states. Such are the powers conferred by the constitutional provisions authorizing Congress to regulate foreign and interstate commerce,³⁶ to lay and collect taxes,³⁷ to establish post offices and post roads,³⁸ and providing that federal treaties shall be the supreme law of the land.³⁹ These provisions are so important that they warrant the special consideration given them in the following chapters.

³⁶ Art. I, sec. 8:3.

³⁷ Art. I, sec. 8:1.

³⁸ Art. I, sec. 8:7.

³⁹ Art. VI, sec. 2.

CHAPTER III

THE COMMERCE CLAUSE AND THE STATE POLICE POWER

It is in the light of the conclusions of the previous chapter that the status of the commerce clause during the early period of our constitutional history must be considered. By the terms of the Constitution, Congress is given power "To regulate commerce with foreign nations, and among the several States, . . ." ¹ It is also given power "To make all laws which shall be necessary and proper" for carrying this power into execution.² By exercising this power Congress has legislated on such subjects as liquor, lotteries, labor, vice, food and drugs, etc. Much of this legislation is of the nature of police regulations, and in attempting to regulate these subjects the federal government has entered a field which constitutionally belongs to the states in the exercise of their police power. Was it the intention of the framers of the Constitution that the federal government should be vested with power to make such regulations?

On the eve of an industrial revolution in America the framers of the Constitution could not foresee the vast changes that were to take place and the increasing governmental activity which those changes would necessitate. A bill of rights was not considered necessary because the federal government had not been vested with powers in the exercise of which it might encroach upon individual rights. The amount of subsequent litigation resulting

¹ *Const.*, Art. I, Sec. 8:3.

² *Const.*, Art. I, sec. 8:18.

from the Fifth Amendment would indicate that the federal government not only had the power to encroach upon individual rights, but that the instances when it has attempted to do so are not infrequent. Similarly, it is not probable that the framers of the Constitution foresaw the vast amount of power they vested in the federal government when they gave Congress the power to regulate commerce. It is reasonable to presume that if the subsequent liberal exercise of this power had been anticipated the commerce clause would have received more serious consideration in the Constitutional Convention than it did. Considering the vast amount of subsequent litigation that has resulted from the power of the federal government to regulate commerce, the commerce clause received relatively little consideration in the convention.

It is well known that unsatisfactory commercial conditions under the Articles of Confederation was one of the main reasons for calling the Constitutional Convention. From the first it was contemplated that the power to regulate commerce should be given to the federal government. The draft of a constitution submitted by Charles Pinckney gave the national legislature power "to regulate commerce with all nations, and among the several states."³ The proposals offered by Mr. Patterson also contained the clause, "To pass acts for the regulation of trade and commerce, as well with foreign nations as with each other."⁴ In the draft of a constitution reported from the Committee on Detail on August 6 is included the clause, "to regulate commerce with foreign nations, and among the several states."⁵ On the 16th

³ *Journal of the Federal Convention for May 29*, p. 75.

⁴ *Ibid.*, June 15, pp. 123-4.

⁵ *Ibid.*, August 6, p. 220.

of August the commerce clause, as reported from the Committee on Detail, came up for discussion in the convention and was approved without debate. Madison, after recording a lengthy debate on the question of the taxing power, briefly records that, "The clause for regulating commerce with foreign nations, etc., was agreed to, *nem. con.*"⁶ On August 22 a committee suggested that the following additions should be made to the clause: "and with Indians within the limits of any state, not subject to the laws thereof."⁷ This suggestion was not acted upon, and on September 4 the committee to which had been referred matters that had been postponed reported that the words, "and with the Indian tribes," should be added. Again Madison notes that there was no objection to the clause or to the addition.⁸ The different provisions of the clause had now been agreed upon, and in the revised draft of the constitution reported out of committee on the 12th of September we find the commerce clause in its final wording. Again, there was no objection to giving to the federal government the power to regulate commerce, and in the letter addressed to the Congress on that date the convention asserted, among other things, that it was necessary to vest this power in the central government.⁹

But if the records show that the commerce clause received unanimous approval in the Constitutional Convention, there is nothing in these records which would indicate that, in giving Congress power to regulate com-

⁶ "Madison's Debates for August 16, 1787," *Madison Papers*, III, p. 1343.

⁷ *Journal*, August 22, p. 277.

⁸ "Madison's Debates for Sept. 4, 1787," *Madison Papers*, III, p. 1488. Madison merely states that "the second clause was also agreed to, *nem. con.*"

⁹ *Journal*, Sept. 12, p. 367.

merce, the framers of the Constitution contemplated that such a grant of power would carry with it the power to make police regulations. In fact, if the records show anything concerning this, it is rather to the contrary. Proposals were made at different times in the convention to safeguard the police power of the states, but these proposals did not come up in connection with the commerce clause. They were offered as a check on the general legislative power of the federal government. Mr. Sherman's resolution was submitted on July 17 when the question of the powers to be granted to the national legislature was scheduled to come up for discussion. The clause contained in this resolution, "but not to interfere with the government of the individual states in any matters of internal police, which respect the government of such states only," was probably intended as an exception to whatever grant of legislative power that might be given to Congress. Again on August 22 among the changes and additions suggested by a committee is found the suggestion that the following ought to be added to the enumerated powers given to Congress: "and to provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the governments of individual states, in matters which respect only their internal police, or for which their individual authorities may be competent."¹⁰ This modification also was not brought up in connection with the commerce clause, although changes in the wording of the commerce clause were suggested in the same report. On September 15, when the final draft of the Constitu-

¹⁰ *Journal*, August 22, p. 277.

tion was being discussed, it was moved to annex a proviso to the Fifth Article, "that no state shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate."¹¹ This time, it will be noticed, the suggestion was made in connection with limiting the amending process.

It is significant, however, that while the framers of the Constitution did not consider the commerce clause in connection with the police power of the states, neither did they consider it necessary to secure the states in the exercise of this power by any express provision in the Constitution. Only two states voted in favor of postponing the other business in order to take up Mr. Sherman's resolution to secure the police power of the states against aggression by the federal government.¹² Only three states voted for the proviso in the amending clause. Later, when the clause in the proviso pertaining to "internal police" had been struck out and the proviso made to apply only to securing equal suffrage in the Senate, it passed in the affirmative.¹³ In the exercise of its power to regulate commerce, more than in the exercise of any other power vested in it, the federal government has repeatedly come into conflict with the states in the exercise of their power to make police regulations. But it is doubtful that any provision in the Constitution, expressly securing the states in the exercise of their police power, would have had the effect of limiting Congress in the exercise of its power to regulate commerce. While nothing is said about it in the Constitution, the courts have always maintained that the police power is vested

¹¹ *Journal*, September 15, p. 386.

¹² *Journal*, July 17, p. 182.

¹³ *Ibid.*, September 15, p. 387.

exclusively in the states, and the same results have probably been attained without a provision as would have been attained had some such proposal as that suggested by Mr. Sherman been inserted in the Constitution.

While it was unanimously agreed in the Constitutional Convention that the regulation of commerce should be given to the federal government, there was not unanimity of agreement regarding the limitations that should be placed upon this power. But even the limitations proposed in the convention would indicate that the framers of the Constitution intended that the commerce clause should apply only to commerce in the strict sense of the word. Two of the proposed limitations were embodied in the Constitution. The one prohibiting Congress from forbidding the importation of slaves prior to the year 1808 was due to sectional interest.¹⁴ It is interesting to note that, while forbidding the importation of slaves would have been an exercise of the power to regulate commerce with foreign nations, the debate on this provision came up mainly in connection with the question of taxation.¹⁵ The other limitation provides that "No preference shall be given by any regulation

¹⁴ *Const.*, Art. I, sec. 9:1; Art. V.

¹⁵ *Madison Papers*, III, pp. 1378-1396. It is important to note in this connection that in the minds of many of the members of the convention there was no clear distinction drawn between the taxing power and the power to regulate commerce. Mr. Sherman suggested that the federal government, being vested with power to regulate commerce, could prevent the states from levying import and export duties which would be injurious to other states. It was felt by the southern members that by levying import duties the central government could discourage the slave trade. It is interesting to observe that the fact that the federal government might use its taxing power and power over commerce to discourage a certain kind of traffic, as has since been done with regard to lotteries and the liquor traffic, was recognized by the southern members in the Constitutional Convention with reference to the slave trade.

of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear, or pay duties in another."¹⁶ This limitation was unanimously agreed to in the convention.¹⁷ Another proposed restriction, which was not embodied in the Constitution, was that of Charles Pinckney which provided that laws regulating commerce should require the assent of two-thirds of the members present in both houses of Congress. This also was due to sectional interest. A provision of this kind had been included in Pinckney's draft of a constitution and on August 29 he moved to postpone the other business in order to consider it.¹⁸ This precipitated a spirited debate between the eastern and southern delegates.¹⁹ Some of the southern delegates contended that the South had nothing to gain by giving the power to regulate commerce to the federal government, that it was a concession on their part, and that sectional interest needed more protection from adverse legislation than a bare majority in Congress would give.²⁰ Only four states, Maryland,

¹⁶ Art. I, sec. 9:6.

¹⁷ *Journal*, August 31, 1787, p. 318; "Madison's Debates for August 31, 1787," *Madison Papers*, III, p. 1477.

¹⁸ *Journal*, May 29, p. 76, and August 29, p. 306.

¹⁹ For report of this debate, see "Madison's Debates, for August 29," *Madison Papers*, III, p. 1450 seq.

²⁰ In giving the federal government the power to regulate commerce the framers of the Constitution were motivated by conditions then existing. In this connection Pinckney's argument in defense of his proposal are illuminating. He argued that there were five distinct commercial interests in the states at that time:

- (1) Fisheries and West Indies trade which belonged to New England;
- (2) Interests of New York, which lay in free trade;
- (3) Wheat and flour, the two staples of the two middle states, Pennsylvania and New Jersey;
- (4) Tobacco, the staple of Maryland, Virginia, and partly of North Carolina;
- (5) Rice and indigo, staples of South Carolina and Georgia. Pinck-

Virginia, North Carolina, and Georgia, voted in favor of Pinckney's motion.²¹ In connection with commerce, there were also some additional grants of power proposed, such as the power to build canals and to grant charters of incorporation.²²

Writing in defense of the Constitution, Madison makes a statement of the reasons why the power to regulate commerce was vested in the federal government. This statement also suggests a restricted use of the term "commerce." It is as follows:

A very material object of this power was the relief of the States, which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during their passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate

ney contended that these different interests would be a source of oppressive regulations, if no check to a bare majority in Congress were provided. *Madison Papers*, III, p. 1450.

²¹ *Journal*, August 29, p. 306. One of the amendments to the Constitution proposed by the Virginia ratifying convention was the proposal of Charles Pinckney, "That no navigation law, or law regulating commerce, shall be passed without the consent of two-thirds of the members present in both houses." *Supplement to the Journal of the Federal Convention*, p. 423.

²² When the question of giving Congress power to grant charters of incorporation came up for discussion, Mr. King and Mr. Mason opposed it on the grounds that it might give Congress power to create mercantile monopolies. Mr. Wilson contended that power to create monopolies was already included in the power to regulate commerce. "Madison's Debates," September 14, *Madison Papers*, III, p. 1576.

in serious interruptions of the public tranquillity. To those who do not view the question through medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as by interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.²³

Giving the power to regulate commerce to the federal government appeared to be a satisfactory arrangement and aroused little opposition in the ratifying conventions. The only danger these conventions generally wished to guard against in this connection was that Congress might use this power to grant a monopoly to certain companies. The convention in Massachusetts suggested, as an amendment to the Constitution, "That Congress erect no company of merchants with exclusive advantages of commerce."²⁴ Conventions in several other states suggested similar amendments. That there was little or no opposition to vesting this power in Congress is evidenced by the statement from Madison: "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."²⁵ Prior to the establishment of the federal government under the Constitution there appears to have been a general acquiescence to

²³ *The Federalist*, Ed. by P. L. Ford, pp. 275-276.

²⁴ *Supplement to the Journal of the Constitutional Convention*, p. 402.

²⁵ *The Federalist*, p. 309.

vesting in Congress the power to regulate commerce. It was also becoming more generally understood that the federal government was one of limited and enumerated powers, and that the governments of the states would be free from interference in their police regulations. There seems to have been no apprehension that the federal government, by an indirect application of the powers vested in it, might attempt to accomplish objects not otherwise within the general legislative powers of Congress and thus actually exercise police powers not expressly vested in it by the Constitution.

But if there were any apprehensions regarding the dual nature of our government prior to 1789, the Supreme Court, since its creation, has always upheld, at least in principle, the idea of enumerated and limited powers. The interpretation that the "Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States" ²⁶ has been consistently maintained; which interpretation carries with it the idea of a federal government with enumerated and limited powers. The dicta of the courts to the effect that the federal government can only exercise powers expressly granted or necessarily implied are numerous and only a few need be given here by way of example. In the early case of *Martin v. Hunter* the court said, "The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." ²⁷ A more forceful statement of the nature of the federal government is given in the case of *United States v.*

²⁶ *Texas v. White*, 1868. 7 Wall. 700, at 725.

²⁷ 1 Wheat. 304, at 326. 1816.

Cruikshank, where the court, speaking of the federal government, said, "Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence."²⁸ These statements show the attitude of the courts. At no time have the courts maintained that the federal government was other than one of enumerated powers.

Do these enumerated powers include the power to make police regulations? On this point also there is technically no argument. The courts have, with few exceptions, always declared that police power is vested solely in the states. The police power has been defined as embracing "those powers by which the health, good order, peace, and general welfare of the community are promoted."²⁹ In the first great case involving the question of interstate commerce, the police power is referred to as that "immense mass of legislation which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control."³⁰ That the police power is left to the states and cannot be assumed by the federal government is pointed out by Judge Cooley in the following words: "In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States. All

²⁸ 92 U. S. 542, at 550. 1875.

²⁹ *Webber v. Virginia*, 1880. 103 U. S. 344, at 348.

³⁰ *Gibbons v. Ogden*, 1824. 9 Wheat. 1, at 203.

that the federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal Constitution.”⁸¹ This has been reaffirmed in a comparatively recent case involving a question of police regulation by the federal government where the court said, “Speaking generally, the police power is reserved to the States and there is no grant thereof to Congress in the Constitution.”⁸² In the case of *The United States v. E. C. Knight Co.* the court said, “The regulation of commerce applies to the subjects of commerce and not to matters of internal police.”⁸³

The doctrine of the division of powers between the national government and the governments of the states is one of the cardinal principles of our constitutional system. But the application of that principle has always been attended with difficulties and has involved considerable litigation. The national government, in the exercise of its powers, has sometimes indirectly effected police regulations. At times the police regulations were the desired objects and the exercise of such powers, as the power to regulate commerce or the power to tax, was merely the means of effecting such regulations. It has not been possible to fix a rigid line of demarcation between the powers to be enjoyed respectively by the federal government and the states. This difficulty was foreseen at an early date, and, in the light of subsequent litigation, the words of Chief Justice Marshall, in the

⁸¹ Thomas H. Cooley, *Constitutional Limitations* (6th ed. Boston, 1890), pp. 706-707.

⁸² *Keller v. United States*, 1909. 213 U. S. 138.

⁸³ 156 U. S. 1, at 13. 1895.

case of *McCulloch v. Maryland*, are prophetic: "This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist."³⁴

From the foregoing résumé of the early history of the commerce clause a few points may be enumerated by way of summary:

(1) It is not probable that the framers of the Constitution foresaw the vast powers with which they were clothing the federal government when they vested it with the power to regulate interstate and foreign commerce. But from their experience under the Articles of Confederation they had learned that it would be better to vest this power in the central government than in the states and consequently the commerce clause aroused little opposition in the Constitutional Convention.

(2) It evidently was not contemplated in the Constitutional Convention that through its power to regulate commerce the federal government might interfere with the police powers of the several states. The majority of the members of the convention, feeling that the federal government would be one of enumerated powers, did not deem it necessary expressly to secure the states in their power to make police regulations. The debates on the question of expressly securing the states in this power did not come up in connection with the commerce clause.

³⁴ 4 Wheat. 316, at 405. 1819.

(3) While the commerce clause itself went through the Convention without debate, there seems to have been a feeling, especially among some of the southern members, that in the regulation of commerce sectional interest should be protected in a manner that would not be possible with a simple majority in Congress deciding, and consequently it was urged that a two-thirds majority should be necessary in order to enact laws making such regulations. This would indicate that the framers of the Constitution were cognizant that they were clothing the federal government with large powers when they vested it with the taxing power and the power to regulate commerce and that they felt that the central government might use these powers to discourage a trade such as the slave trade.

(4) It appears to have been the feeling at the time of the adoption of the Constitution that the federal regulation of commerce would extend mainly to foreign commerce. The interstate commerce at that time was of little importance, but it was felt to be essential that the people of states less favorably located with regard to harbors should be protected against the levy of injurious duties by more fortunate states. This appeared to be a fair arrangement and aroused little or no opposition in the ratifying conventions.

(5) Finally, if there were any doubts regarding the powers conferred upon the federal government at the time of the adoption of the Constitution, the Supreme Court has sought to clarify this by consistently asserting that the national government is one of enumerated powers and that the police power is left to the several states.

Such legal questions as, What is commerce? When is commerce interstate? What constitutes an interference with interstate commerce? are too complicated to be considered in a brief chapter like this. These questions have been fully discussed in the numerous works on constitutional law and in the large number of decisions

covering these points. In so far as they pertain to social and economic legislation enacted by Congress, they are considered in subsequent chapters dealing with those subjects. Suffice it to say, by way of introduction, that, roughly speaking, the history of the litigation over the commerce clause falls into three periods: (1) The early decisions sought to determine whether the power to regulate foreign and interstate commerce was exclusively with the federal government, or was a concurrent power. (2) Later the decisions considered the line of demarcation to be drawn between the exclusive and the concurrent parts of the power. (3) Recently the courts have had to decide the extent of the congressional power to regulate matters which are only incidental to commerce.³⁵ We are primarily concerned with this last phase. In regulating matters which affect commerce only incidentally, Congress has extended its legislative control to things which formerly the states alone attempted to regulate, and, the control of which, technically belongs also to the states. Congress is thus attempting to regulate human conduct to an extent not anticipated by the framers of the Constitution, and in a manner which can be justified only by a very liberal interpretation of the Constitution.

The commerce clause has been the principal provision invoked by Congress when seeking a constitutional justification for an extension of federal authority. In the present chapter we have given it only a brief notice. However, it is so closely related to the various phases of federal centralization that we shall frequently have to return to it in the chapters dealing with social and economic legislation. In the meantime let us turn to

³⁵ James Parker Hall, *Constitutional Law*, Chicago, 1914, p. 283.

some of the other constitutional provisions, such as the taxing clause, the postal clause, and the treaty-making provision, all of which have been invoked by Congress in legislating on subjects over which the states also have jurisdiction.

CHAPTER IV

THE FEDERAL TAXING POWER

WHILE the commerce clause has been the principal basis for federal legislation which partakes of the nature of police regulations, there are some other provisions in the Constitution which merit consideration in this connection. These are the provisions dealing with the power of Congress to levy taxes, the treaty power, and the congressional power to establish and maintain a postal system. In time of war, the war powers of the federal government have been exercised in such a manner as to conflict with the jurisdiction of the states. This, however, has taken place only under unusual conditions and has furnished comparatively little litigation over conflicting jurisdictions. In the previous chapter it was noted how, through its power to regulate interstate commerce, the federal government has frequently come into conflict with the states in the exercise of their police powers. The taxing power, treaty power, and power to regulate the mails have not so frequently brought about such a conflict, but nevertheless have been of great importance in extending the jurisdiction of the central government into the domain of the states. Together with the commerce clause, the constitutional provisions for the exercise of these powers have been practically the only basis for what, for the lack of a better term, might be called the national police power. It is the purpose of the present and the two following chapters to examine

briefly these powers in their constitutional and historical foundations and to indicate the course they have taken and might take in serving as a basis for congressional legislation on matters which the states also regulate through their power to enact police regulations.

The tragic weakness, as every student of history knows, of the central government under the Articles of Confederation was the lack of provisions for the effective exercise of those vital powers which an independent government must exercise in order to properly function. This is clearly indicated by the provisions for the taxing power contained in the Articles. Article VIII provided that:

All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in congress assembled, shall from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in congress assembled.

The weakness of this provision is obvious. In the first place, the quota to be exacted from each state was to be determined solely on the basis of ownership of land, which manifestly might be unfair. In the second place, and of far greater consequence to the life of the confederation, the central government had no way of compelling the states to furnish their respective quotas.

The states vied with one another in withholding these taxes and the central government was unable to meet its obligations.¹ Consequently, the necessity of clothing the federal government with an independent taxing power was one of the most important of the considerations which brought about the Federal Constitutional Convention.

The Constitution provides that Congress shall have power "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."² It is significant that this clause was placed first among the provisions dealing with the powers of Congress. From the general nature of the language of the clause it would appear that the framers of the Constitution were willing to take heroic measures in order to insure the federal government an independent source of revenue.

But if the purpose of the taxing clause was to make the federal government independent of the states in the collection of its revenues, it is also clear, from the records, that the fathers of the Constitution did not intend that, in the exercise of its taxing power, the central government should encroach upon the authority retained by the states. Through its taxing power a government may discourage certain enterprises and practices. A tax may be levied for regulatory rather than for revenue purposes. The members of the Constitutional Convention were not blind to this fact. In the general language of the taxing clause they saw the dangers of Congress enacting police regulations through its power to levy and col-

¹ For a lucid discussion of the difficulties confronting the central government under the Articles of Confederation, see John Fiske, *Critical Period of American History*, Boston, 1888.

² Art. I, sec. 8: 1.

lect taxes. When the clause came up for consideration in the convention, it precipitated a spirited intersectional debate.³ The members from the South were apprehensive lest the taxing power might be used to discourage the slave trade and to favor the interests of one section of the country to the detriment of another section. Consequently when the Constitution finally emerged from the convention the taxing power of Congress was qualified by several restrictions. Congress could not tax the exports from any state,⁴ it could not give a preference to ports in different states,⁵ taxes must be uniform throughout the United States,⁶ and direct taxes could only be levied in proportion to population.⁷ The importation of slaves could not be prohibited prior to 1808, and to prevent the taxing power from being used to abolish this traffic, a head tax of \$10 was fixed as the maximum that could be levied upon the importation of such persons.⁸

These restrictions were primarily designed to prevent the national government from encroaching upon the states through its exercise of the taxing power. That they are real restrictions is seen when one considers that by them the taxing power was changed from the sweeping power which the taxing clause vested in Congress to a power which permitted Congress to levy mainly indirect taxes and to levy these only under certain constitutional stipulations. The restrictions, however, did not handicap Congress in raising revenues. Congress could determine the amount of the imposts and excises and could always exact enough returns to meet the expenses of government. But by these restrictions Congress was

³ *Madison Papers*, III, pp. 1378-1396.

⁴ Art. I, sec. 9: 5.

⁵ Art. I, sec. 9: 6.

⁶ Art. I, sec. 8: 1.

⁷ Art. I, sec. 9: 4.

⁸ Art. I, sec. 9: 1.

handicapped in levying taxes for regulatory rather than for revenue purposes.

The wording of the taxing clause at first glance seems clear and unambiguous. Still a great many controversies have centered about the extent of power that is given to the federal government by this clause. These controversies, in the main, have centered about the question: For what purpose may Congress levy and collect taxes? The clause itself would seem to provide that the purposes for which Congress may levy taxes are "To pay the debts and provide for the common defense and general welfare of the United States." This was the interpretation Jefferson gave to the clause in his opinion on the constitutionality of the Bank of the United States.⁹ But "To provide for the common defense and general welfare" is a broad phrase and more careful delineations have been attempted. In general, it may be said that there are three views prevailing regarding the purposes for which Congress may tax. First, there are those who hold that the taxing power may be invoked only for the purpose of raising revenue. Secondly, there is the view that Congress may use the taxing power in order to carry out any of its other delegated powers. Finally, it is asserted by some that through the taxing power Congress may exercise powers not specifically granted by the Constitution and only incidentally related to the raising of revenue.¹⁰

A brief analysis of these views may serve to clarify the problem of the extent to which Congress, in the exer-

⁹ *Jefferson Correspondence*, vol. 4, pp. 524, 525.

¹⁰ For this classification the author is indebted to Professor Cushman. See Robert E. Cushman, "Studies in the Police Power of the National Government," *Minnesota Law Review*, IV (1920), p. 251.

cise of the taxing power, can legislate on matters which are also subject to state legislation.

The view that federal taxes may be levied only for revenue is substantiated by several considerations. To the mind of the average layman a tax means money exacted from the individual by the government to meet the expenses of government. The idea of revenue is uppermost in his mind. This view also has been persistently, though not always consistently, held by the opponents of a protective tariff.¹¹

To conclude that the taxing power vested in a government can only be exercised for the purpose of raising revenue is probably taking a too narrow view of that power. Story states that:

Nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles, for the encouragement and protection of domestic products, and industry; for the support of agriculture, commerce and manufactures, for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes, as a bounty upon an infant manufacture, or agricultural product; sometimes, as a temporary restraint of trade; sometimes, as a suppression of particular employments; sometimes, as a prerogative power to destroy competition and secure a monopoly to the government.

¹¹ Such a view was taken by Calhoun during the Nullification Controversy in 1829. See *Works*, VI, pp. 1-59. The Democratic platform in 1912 declared it "To be a fundamental principle of the Democratic Party that the Federal Government under the Constitution has no right to impose or collect tariff duties except for the purposes of revenue. . . ."

If, then, the power to lay taxes, being general, may embrace, and in the practice of nations does embrace, all these objects, either separately or in combination, upon what foundation does the argument rest which assumes one object only, to the exclusion of all the rest, which insists, in effect, that because revenue may be one object, therefore, it is the sole object of the power . . . ?¹²

Another eminent authority frequently quoted by the courts, Judge Cooley, emphatically declared, "Revenue is not and has never been the sole object of taxation."¹³

It also should be observed that the taxing clause itself furnished no basis for the contention that in the exercise of the taxing power Congress can levy taxes for revenue only. This is clearly and forcefully pointed out by Story in the following paragraph:

If the common defense or general welfare can be promoted by laying taxes in any other manner than for revenue, who is at liberty to say that Congress cannot constitutionally exercise the power for such a purpose? No one has a right to say that the common defense and general welfare can never be promoted by laying taxes, except for revenue. No one has ever yet been bold enough to assert such a proposition.¹⁴

Finally, in considering the view that federal taxes must be for revenue only, it should be noted that the courts have never taken this stand. The securing of revenues has been the main purpose of taxation. For this reason the courts have been inclined to use this as

¹² Joseph Story, *Commentaries on the Constitution of the United States*, 2 vols., 5th ed., Boston, 1905, I, 711.

¹³ Thomas M. Cooley, "Federal Taxation of Lotteries," in *Atlantic Monthly*, LXIX, p. 523 (1892), quoted by Cushman, *Minnesota Law Review*, IV, p. 269. Cooley takes an opposite view in *Principles of Constitutional Law*, 3d. ed. Boston, 1880, p. 58.

¹⁴ *Commentaries*, I, 712-713.

a criterion when testing the constitutionality of congressional taxing legislation. If on the face of the act it is apparent that it was intended as a revenue measure, the courts have been inclined to uphold it even though the legislators enacting the law had a different motive. This was the attitude of the court in upholding a prohibitive tax on oleomargarine,¹⁵ and in sustaining the Federal Narcotic Drug Act,¹⁶ and a similar view was expressed in the recent child labor decision.¹⁷ But to assume the validity of revenue as a purpose in taxation is not necessarily to assume that any other purpose is invalid. The Supreme Court has never held that revenue is the only purpose for which the taxing power may be exercised.¹⁸

It would then appear that, while the raising of revenue is the principal purpose of taxation, it is not the only purpose for which the taxing power may be invoked. The second view which we have noted holds that this power may be used to carry out any of the other enumerated powers of Congress. This question has frequently come up in connection with protective tariffs. Alexander Hamilton was of the opinion that such a tariff could be imposed under the taxing power for the purpose of

¹⁵ *McCray v. U. S.*, 1905, 195 U. S., 29.

¹⁶ *U. S. v. Doremus*, 1919, 249, U. S., 86.

¹⁷ *Bailey v. Drexel Furniture Co.* 1922, 66 L. Ed., 522.

¹⁸ In favor of the view that the taxing power of the federal government can be invoked only for the purpose of raising revenue, it might be urged that a tax which is imposed for the purpose of making regulations deemed necessary for the public safety, health, or welfare is, properly speaking, not a tax. A number of authorities might be cited to show this. See Henry C. Black, *Constitutional Law*, St. Paul, 1910, 3d ed., 467; Thomas M. Cooley, *Law of Taxation*, 2 vols., 3d ed., Chicago, 1903, II, 1125; Ernst Freund, *Police Power*, Chicago, 1904, sec. 25; Emlin McClain, *Constitutional Law in the United States*, N. Y., 1907, 133. This, however, introduces the subject of using the taxing power to regulate matters which are only incidental to taxation and will be considered in that connection.

providing for "the common defense and general welfare."¹⁹ If a tariff is so high that it is prohibitive, it is obvious that it is not a revenue measure. In such a case it would seem that the duty was imposed as a regulation of commerce rather than as a tax. Cooley notes this when he states that "perhaps even prohibitive duties may be defended as a regulation of commercial intercourse."²⁰

The Supreme Court has never definitely endorsed this view in connection with protective tariffs but has done so in another connection. In 1866 Congress laid a prohibitive tax of ten per cent upon state bank notes.²¹ The purpose of this tax was to protect the notes of the newly established national banks against the competition of state bank notes. This act was upheld in the case of *Veazie Bank v. Fenno*.²² After stating that the tax was not a direct tax and that it could not be declared unconstitutional simply because it was excessive, the court went on to say that the imposition of such a tax was constitutional because under the Constitution the power to provide a circulation of coin is given to Congress and in the exercise of this power it might impose a tax such as the one in question. The court stated that, "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of

¹⁹ *Works*, ed. by Henry Cabot Lodge, vol. IV, 151.

²⁰ *Principles of Constitutional Law*, 58.

²¹ Act of July 13, 1866, 14 Stat. at L. 146.

²² 8 Wall. 533, 1869.

counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration.”²³ In the *Head Money Cases*²⁴ the court took a similar view. In this case it was held that the imposition on ship owners of a tax of fifty cents for every alien immigrant brought into the United States by vessel was not an exercise of the taxing power, but was more in the nature of a regulation of commerce. It has even been held that a law requiring that a stamp be placed on goods intended for export in order to prevent fraud is not unconstitutional even though a charge is made for the stamp;²⁵ but if such a charge is made for the purpose of raising revenue rather than for regulation, it becomes a tax on exports and consequently is unconstitutional.²⁶

In the face of these holdings it would be difficult to dispute that federal taxes may be imposed for other than revenue purposes. Such decisions clearly indicate that Congress may levy taxes as necessary and proper means of carrying out the powers that have been delegated to it. These cases are sometimes cited to prove that Congress may use the taxing power in a general regulatory way for the purpose of enacting police regulations. They prove nothing of the sort. To use the

²³ *Ibid.*, p. 549.

²⁴ 112 U. S. 580, 1884.

²⁵ *Pace v. Burgess*, 1875, 92 U. S. 372.

²⁶ *Almy v. California*, 1860, 24 How. 169.

words of Professor Cushman, "In every case which the Supreme Court of the United States has been willing to recognize that Congress has levied taxes for purposes other than revenue, it has looked upon these taxes not as exercises by Congress of its granted power to tax, but as means employed for carrying out other delegated congressional powers." A tax need not necessarily be for the purpose of revenue, but if it does not have such a purpose, in order to be valid, it must have a reasonable relation to the furtherance of some delegated congressional power.

The third view of the taxing power which we have noted is that Congress, in the exercise of the taxing power, is not limited by considerations of revenue or the carrying out of its delegated powers, but may use this power to enact legislation which, constitutionally, it is not specifically authorized to enact and which is only incidental to taxation. Such a view of the taxing power is of vital importance in connection with a study of federal expansion. If this view were adhered to, it would mean that the jurisdiction of the federal government could be extended indefinitely into that of the states. It would mean that in the guise of laying taxes Congress could legislate on matters which constitutionally have been left exclusively with the several states.

This view has been defended on the ground that, outside of the restrictions on the exercise of this power contained in the Constitution, the power of the federal government to tax is as plenary as that of the states.²⁷ At first glance such a contention may seem logical.

²⁷ In the debate on the oleomargarine tax law of 1886 Senator Edmunds maintained that, "the taxing power of the United States is just as extensive, just as supreme, just as illimitable as the taxing power of every state is." *Cong. Rec.*, July 19, 1886, vol. 17, p. 7139.

However, it must be remembered that it was the intention of the framers of the Constitution to establish a government of enumerated and delegated powers. The principle that Congress can exercise only those powers which have been granted to it by the Constitution is elementary constitutional law. The view that it might invoke the taxing power, as a general grant of power, to enact legislation which otherwise it could not constitutionally enact obviously is contrary to the theory of the division of powers between the central government and the states.

In order to show the attitude of the courts towards such legislation, a few instances might be pointed out where Congress, in the guise of taxing, has enacted what might be termed police regulations. In 1886 Congress levied a tax of two cents per pound on oleomargarine.²⁸ By an act of 1902 this tax was increased from two to ten cents per pound.²⁹ The act of 1902 also provided that oleomargarine which was not artificially colored to resemble butter should be taxed only one fourth of one cent per pound. These acts might be termed "dairy legislation." The motive of Congress was not so much the procuring of revenue as it was to protect the dairy industry and to secure the consumers against colored oleomargarine being fraudulently sold as butter.³⁰ The constitutionality of the act of 1902 was upheld in the case of *McCray v. United States*.³¹ Chief Justice White, who delivered the opinion of the court, declared that this act was a revenue measure, that it was within the power

²⁸ 24 Stat. at L. 209.

²⁹ 32 Stat. at L. 193.

³⁰ See speech of Senator Spooner, *Cong. Rec.* April 1, 1902, vol. 35, p. 3506.

³¹ 195 U. S. 27, 1904.

of Congress to levy such a tax, and that the courts would not inquire into the legislative motive. In answer to the argument that such a tax was unconstitutional because it was prohibitive, the court stated that it was within the power of Congress to levy such a tax and that for the court to restrain the exercise of a lawful congressional power would be an encroachment upon Congress by the judiciary.³²

In 1914 the Harrison Narcotic Drug Act was passed.³³ This act provided that narcotic drugs could be sold only under certain specified conditions by registered dealers and levied an excise tax of one dollar a year on such dealers. Obviously the purpose of this act was to control the drug evil by prohibiting the indiscriminate and clandestine sale of narcotics. To consider it a revenue measure because it imposed a tax of a dollar a year on registered drug dealers is absurd. The Supreme Court, however, held that it was a revenue measure and that the provisions in the act regulating the sale of drugs might be necessary for the administration and collection of the tax.³⁴

The Narcotic Drug Act apparently approached the limits of congressional power to enact police regulations through the authority conferred by the taxing clause. In the decision sustaining this act four judges, including the Chief Justice, dissented on the ground that this was an exercise of power not delegated to Congress, but reserved to the police power of the states. When Con-

³² This statement was qualified by the observation that the manufacture of oleomargarine was regulated by the states, and by its nature was an industry that could be regulated without an interference with fundamental rights.

³³ 38 Stat. at L. 785.

³⁴ *U. S. v. Doremus*, 1919, 249 U. S., 86.

gress, through the use of the taxing power, attempted to regulate child labor, the Supreme Court, in a recent decision, declared that this was overstepping the bounds of delegated congressional power.

The far-reaching influence of the child labor decisions is considered in another connection.³⁵ But a brief consideration of one of these decisions must be given here because of its bearing upon the taxing power of Congress. In the former act Congress had attempted to regulate child labor under its power to regulate interstate commerce. This act had been declared unconstitutional by the Supreme Court.³⁶ By an act of February 24, 1919, Congress again sought to regulate the labor of children by invoking the taxing power to this end.³⁷ The act of 1919 imposed a tax of ten per cent of the net profits of the year upon employers in certain industries who knowingly employed, during any portion of the taxable year, a child within the age limits prescribed in the act. This act was recently declared unconstitutional by the Supreme Court in the case of *Bailey v. Drexel Furniture Company*.³⁸ In its opinion, the court stated, that if this tax were "an excise on a commodity or other thing of value we might not be permitted, under previous decision of this court, to infer, solely from its heavy burden, that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction from a departure from a detailed and specified course of conduct in business." That course, the court stated, was that employers in certain industries should not employ children under certain ages. If an employer de-

³⁵ *Infra* chap. VIII.

³⁶ *Hammer v. Dagenhart*, 1918, 247 U. S., 251.

³⁷ 40 Stat. at L. 1057, 1138, chap. 18.

³⁸ 66 L. Ed. 522, 1922.

parted from this prescribed course he was to pay the government one tenth of his entire profits for a full year. It did not matter if such departure consisted in employing a thousand children for the entire year or one child for a day. The tax then must be considered as an imposition of a penalty for departing from a course of business prescribed by Congress. "In the light of these features," the court said, "a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulative effect and purpose are palpable."³⁹

What for our purpose is most significant about this decision is that the court clearly saw the vast possibility for federal expansion into the jurisdiction of the states and the consequent diminution of the power of the states that might be realized by an unscrupulous exercise of the congressional taxing power. It would be difficult to point this out more lucidly than the court did in the following words: "Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."⁴⁰

From this brief survey of decisions some conclusions

³⁹ *Ibid.*, at 524.

⁴⁰ *Ibid.*

may be drawn. In the first place, it should be noted that the court will not consider the legislative motive. Even in the child labor decision this was not done. An examination of the debates in Congress while this bill was pending would have clearly shown that the motive was, not to secure revenue but, in the guise of exercising a constitutional power, to enact police regulations for which there was no constitutional authorization.⁴¹ The act in question has been judged on its face and not by the motives that inspired it. The Supreme Court has upheld the federal tax on corporations on the ground that it was clearly a revenue measure.⁴² On its face the oleomargarine act might be construed as a revenue measure. The same might be said, though with less certainty, for the narcotic drug act. At any rate, these acts did not palpably show that they were intended for police purposes. Consequently these acts were upheld by the court. The child labor law, on the other hand, on its face, showed that it was intended, not as a revenue measure, but rather as a police regulation. It would be difficult to construe this act as a revenue measure. For this reason it was not sustained by the court. From this we might conclude that if a federal act is to be constitutional, it must admit of the construction that it was intended either as a revenue measure or to further some delegated power of Congress. Or, to turn the case around, if such an act, on its face, shows that it was not

⁴¹ During the debate on the child labor bill Senator Lodge declared, "The main purpose is to put a stop to what seems to be a very great evil and one that ought to be in some way put a stop to. If we are unable to reach it constitutionally in any other way, then I am willing to reach it by the taxing power, which the courts have held can be used constitutionally for such a purpose. I see no other way to do it." *Cong. Rec.*, Dec. 18, 1918, vol. 57, 611.

⁴² *Flint v. Stone Tracy Company*, 1911, 220 U. S. 107.

intended as a revenue measure or to further some delegated power of Congress, but was intended to accomplish some other end, it will not be upheld by the courts. This, of course, undermines the third view of the taxing power which we have considered. But certainly, in the light of these decisions, the taxing power cannot be considered as a general grant of power. It can only be exercised to accomplish ends which are constitutional. These ends are the raising of revenue or the furtherance of congressional authority delegated by clauses other than the taxing clause.

The three views of the taxing power which have been considered deal mainly with the purposes for which Congress may exercise the authority to tax. There are some other limitations of this power which should also receive consideration. The child labor law did not impose a tax upon commodities. It imposed a penalty, in the form of a tax, upon the employer of children. Consequently the decision of the court on this legislation cast little light on the question of how far Congress can go in levying excise taxes upon commodities. That Congress may levy such taxes is not questioned. Excises have been an important source of revenue of the federal government since its establishment. On rare occasions, however, Congress has made these taxes so heavy as to render them prohibitive in their nature. In 1912 Congress prohibited the manufacture of matches made from poisonous phosphorus by subjecting these matches to a tax of two cents per hundred.⁴³ The tax on artificially colored oleomargarine also was a prohibitive tax. The question then arises, When may Congress levy taxes

⁴³ 37 Stat. at L. 81. The constitutionality of this legislation has not been tested in the courts.

which are prohibitive? This question is partly answered in the *Veazie Bank case*.⁴⁴ In this case the court held that Congress could levy such a tax if it were necessary to protect itself in the exercise of one of its enumerated powers. More light is thrown by dicta of the court in the *McCray case*.⁴⁵ In this case the nature of the article which was taxed was discussed and considered a determining factor. The court stated that:

It has been conclusively settled by this court that the tendency of that article (oleo) to deceive the public into buying it for butter is such that the states may, in the exertion of the police powers, without violating the due process clause of the Amendment, absolutely prohibit the manufacture of the article. It hence results, that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the 5th Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution.⁴⁶

Such dicta indicate that if the nature of the object taxed is such that it can be prohibited without violation of fundamental rights, the federal government may prohibit it by taxation. On the other hand, the taxing power could not be used to prohibit a calling which might be

⁴⁴ 8 Wall, 533, 1869.

⁴⁵ 195 U. S. 27, 1904.

⁴⁶ *Ibid.*

pursued as of constitutional right. This is again indicated in the concluding paragraph of the opinion in the *McCray* case when the court said:

Let us concede that if a case as presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.⁴⁷

If there is a reasonable basis for the classification, Congress may single out certain objects and levy excise taxes upon these objects. If the nature of these commodities is such that a person does not have a constitutional right to manufacture or sell them, Congress may levy prohibitive taxes upon these objects without a violation of rights secured to the individual by the Constitution. By historical usage certain callings have become subject to governmental regulation to the extent that a person may not pursue them as of constitutional right. Trafficking in intoxicating liquors, gaming, and various types of amusements are such callings. They have always been subject to governmental regulations by the

⁴⁷ *Ibid.*

states. In the light of the dicta in the *McCray* case, the federal government could probably levy prohibitive taxes in such cases without a violation of constitutional rights. Congress, in the exercise of its taxing power, could then enact important police regulations. It is questionable whether a constitutional amendment was needed in order to empower the federal government to prohibit the liquor traffic. Such a regulation might have been accomplished by the use of prohibitive taxes.

There are a few other restrictions on the federal taxing power which are so familiar that they need only to be mentioned in passing. Among these might be mentioned the constitutional restriction that all taxes must be uniform, that direct taxes must be in proportion to population,⁴⁸ that no preference shall be given to different ports, and that no taxes shall be levied upon the exports from any state. Then there is the implied restriction that the federal government cannot tax the government, functions, or agencies of the states.⁴⁹ There is also the restriction that taxes must be levied for a public purpose.⁵⁰

In conclusion, and by way of a summary, the following points should be noted in connection with the federal taxing power:

(1) The taxing clause does not contain a general grant of power. It is merely one of the enumerated powers given to Congress by the Constitution. The framers of the Constitution, however, realized that the taxing power might be used by Congress to the detriment of the powers of the states and consequently hedged it in with restrictions.

⁴⁸ This has been modified by the Sixteenth Amendment with regard to federal income taxes.

⁴⁹ *Collector v. Day*, 1871, 11 Wall. 113.

⁵⁰ *Loan Association v. Topeka*, 1875, 20 Wall. 655.

(2) The only ends for which the taxing power may be employed is to raise revenue or to aid the federal government in the exercise of one of its delegated powers. It cannot be used ostensibly for police purposes. But the courts will not inquire into the legislative motive and will sustain an act purporting to levy a tax unless such a measure shows on its face that it was not intended for revenue or in furtherance of a delegated power, but was intended to accomplish ends which Congress was not authorized to accomplish directly.

(3) Congress may levy prohibitive taxes if they are necessary to secure the federal government in the exercise of its delegated powers. In the light of dicta from the *McCray* case it seems probable that such taxes can also be levied when the business is one that cannot be pursued as of constitutional right.

(4) Finally, the federal taxing power is restricted by certain expressed and implied limitations.

CHAPTER V

THE POSTAL CLAUSE

It is through the post office department that the average individual comes most frequently into contact with the federal government. By land, by water, and by air this department is daily reaching the millions of people whom it serves. Its numerous branches extend into every village, hamlet, and isolated rural district. Even our remotest insular possessions are reached by it. It is the largest of the executive departments in number of employees, its personnel numbering more than a quarter of a million. In 1920 nearly a half billion dollars was spent to maintain this service. In the crowded metropolis, on the sparsely settled plains, and in the remote forests its agents are to be found. Every day the post office department handles over twenty million letters. Every year it handles more than fifteen billion pieces of mail. Isolated indeed is the individual who does not sometimes depend upon the federal government for this service.

Considering the size and importance of the postal service at the present time, it is interesting to note that in the Constitutional Convention the postal clause provoked practically no discussion. It may seem strange that the delegates who were jealous of states rights should not have protested against the vesting, without qualifications, of this important function in the federal government. This was probably due to historical considerations.

Having its crude beginnings in the first half of the 17th century, at the time of the outbreak of the Revolution a fairly extensive postal system had been developed in the colonies. This was carried over during the Revolution and made subject to regulations by the Continental Congress. It was likewise regulated by Congress under the Articles of Confederation. Consequently when the Constitutional Convention assembled the members had had an opportunity of seeing the advantages of having the postal service regulated by the central government.

The Constitution merely provides that Congress shall have power "to establish Post Offices and Post Roads."¹ It does not expressly forbid the states from engaging in the postal service. In fact there are no expressed stipulations which would indicate that the postal service should be monopolized by the federal government. It was made a monopoly of the federal government by an act of Congress in 1792.² It has remained a monopoly ever since and the view of the courts seems to be that "the monopoly of the government is an optional . . . part of the postal system."³ Unlike the regulation of commerce where the states also have legislated, in the regulation of the postal service the federal government has exercised exclusive control.⁴

In establishing and maintaining a postal service on

¹ Art. I, Sec. 8: 7.

² 1 Stat. at L. 232.

³ *United States v. Rochersperger*, 1860, Fed. Cas. No. 15,541.

⁴ The subject of the expansion of the postal power of Congress has been fully covered by Professor Lindsay Rogers in a monograph entitled "The Postal Power of Congress," *Johns Hopkins University Studies in Historical and Political Science*, 1916. The legal phases of the subject have also been very ably treated by Professor Robert E. Cushman in his "Studies in the Police Power of the National Government," *Minnesota Law Review*, May, 1920. The writer has freely drawn from both of these sources in the preparation of this chapter.

such a large scale, Congress necessarily has had to make numerous regulations. Most of these regulations have dealt purely with the problem of improving the service. Others have dealt only incidently with the efficiency of the service, the postal clause serving as a constitutional basis for police regulations. We are primarily concerned here with how the federal government has enlarged its sphere of activities through the postal power. For our purposes we might roughly classify these regulations into three groups. First, there is the legislation which enlarges upon the postal system as a collectivistic enterprise. Secondly, there is the body of rules and regulations describing under what conditions the postal privileges may be enjoyed or forfeited. Finally, under its power to establish post roads, Congress has influenced and aided the states in internal improvements.

The first of these groups may be passed over rapidly. Obviously the whole postal system is a collectivistic enterprise. It is a service which individuals cannot perform satisfactorily and profitably and consequently one that has been taken over by the government in all modern states. But more recently the United States has followed the leading of European countries and has enlarged the activities of the postal service so that the government has entered into competition with certain private business enterprises. In 1864 the postal money order system was established and the government began to render services which are also rendered by banking firms and express companies. In 1911 the postal savings banks were created and the government went into the banking business. In 1912 the system of parcel post was established and the federal government entered into direct competition with express companies and other

common carriers. These extensions have not directly encroached upon the jurisdictions of the states, but they show a considerable increase in the activities of the federal government.

It is with the second group of regulations that we are primarily concerned. These regulations have been enacted ostensibly to safeguard the postal service. A number of these regulations, however, have been aimed rather at discouraging certain disapproved practices than at the promotion of the efficiency of the service. This second group of regulations can be subdivided into two classes: (a) Those dealing purely with the efficiency of the service, and (b) those by which Congress has sought to abate certain evils by refusing to lend an agency under its control to their furtherance.

The power of Congress to pass laws to promote the efficiency of the postal service has never been seriously questioned. Congress has enacted such legislation ever since the establishment of the postal system under the Constitution in 1789. In the early case of *McCulloch v. Maryland*⁵ Chief Justice Marshall referred to these postal regulations as illustrations of laws which were necessary and proper to carry out a delegated power of Congress. Some twenty sections of the United States Criminal Code are devoted to such offenses as robbing the mails, counterfeiting money orders or stamps, defrauding the post office, etc.⁶ A number of the regulations for promoting the efficiency of the postal service have been designed to insure the government monopoly. To give efficiency to its regulations and prevent rival

⁵ 4 Wheat. 316, 1819.

⁶ Act of March 4, 1909, 35 Stat. at L. 1088, secs. 189-202, 205, 218-221, 227-228.

postal systems Congress has made it an offense for private individuals to engage in carrying the mails.⁷ The power of Congress to enact such provisions has not been seriously attacked.⁸ To protect the postal system there has also been an exclusion of articles which might be injurious to the service. A list of articles which are not mailable has been included in the Criminal Code.⁹ The postmaster general has also been authorized to add to this list. This list includes such things as explosives, highly inflammable articles, poisons, etc.

The power of Congress to enact legislation for the protection of the postal service has never been questioned, but the Supreme Court has given expression to dicta in support of such legislation.¹⁰ In thus protecting the mails the government is not only exercising a right but is performing a duty. It has forbidden private individuals to engage in the postal service and has thus established a monopoly. When it accepts mailable matter it is morally responsible for its safe delivery. In interstate commerce Congress has also forbidden articles which would be injurious to commerce. There, however, the shipper may have redress against the common carrier in case his goods are injured in transit. But in the case of the mails he has no redress unless the government will make such a concession. Furthermore, the federal government has a proprietary interest in the postal service and for this reason could probably go further in making

⁷ United States Criminal Code, 35 Stat. at L. 1088, secs. 179, 181, 186.

⁸ Questions have arisen as to the correct interpretation of such provisions. See *United States v. Thompson*, 1846, 9 Law Rep. 451, Fed. Cas. No. 16,489; *United States v. Bromley*, 1851, 12 How. 87; *Ex parte Jackson*, 1877, 96 U. S. 727.

⁹ United States Criminal Code, 35 Stat. at L. 1131, sec. 217.

¹⁰ *Public Clearing House v. Coyne*, 1903, 194 U. S., 497.

regulations than it could in the regulation of interstate carriers over which it has only a control.

The regulations considered above are intended to protect the government in the exercise of one of its delegated powers. The constitutionality of these regulations is clear. It is also clear that in making such regulations the government has not done more than what was reasonably necessary to insure the efficiency of the service. But in attempting to discourage certain disapproved practices by means of postal regulations Congress has gone further than was necessary to insure the efficiency of the service. Congress could not directly prohibit these practices but it could refuse to lend the postal system under its control to their furtherance. This it has done in many instances and it is because of legislation of this kind that Congress has been charged with regulating by indirection what it could not constitutionally reach directly. Under its power to regulate the postal service Congress has excluded from the mails obscene literature, lottery tickets, fraudulent matter, prize fight films, and seditious and treasonable publications. It has refused to allow the postal facilities to be used as an agency for the violation of federal law or for purposes of violating or evading state laws. It has even been proposed that conformity to general police regulations be made the price of enjoyment of mail facilities.

The question of lotteries is considered in another connection¹¹ and we need only mention here that the postal clause, together with the commerce clause, has served as a constitutional basis for anti-lottery legislation. The first federal legislation unfavorable to lotteries was

¹¹ *Infra*, chap. VIII.

passed in 1827 and was a postal regulation.¹² Subsequent postal regulations unfavorable to lotteries were enacted in 1868,¹³ 1872,¹⁴ 1876,¹⁵ 1890,¹⁶ and 1895.¹⁷

Through its power to make postal regulations Congress has sought to prevent the perpetration of fraud by excluding fraudulent matter from the mails. As in the case of lotteries, Congress could not directly prohibit fraudulent practices. It could, however, prevent a person engaged in such practices from reaching his victims through the agency of the postal system. The first attempt to exclude fraudulent matter from the mails was in 1872.¹⁸ This law authorized the postmaster general to withhold registered letters and payment of money orders to persons whom he had reason to believe were using the mails in furtherance of fraudulent practices. It also forbade, under severe penalty, the use of the mails for such purposes. This law was amended in 1889 and the list of fraudulent schemes which were forbidden the use of the mails was extended.¹⁹ In 1895 the scope of the fraud orders which might be issued was extended to include all first class mail.²⁰

The regulation of public morals is left by the Constitution to the states, and Congress did not act until it was found that agencies under federal control were used for the corruption of morals. This was the case in dealing with obscene literature. This subject was first dealt with by Congress, under its power to regulate com-

¹² Act of March 4, 1827, 4 Stat. at L. 238.

¹³ Act of July 27, 1868, 15 Stat. at L. 194.

¹⁴ Act of June 8, 1872, 17 Stat. at L. 283.

¹⁵ Act of July 12, 1876, 19 Stat. at L. 90.

¹⁶ Act of Sept. 19, 1890, 26 Stat. at L. 465.

¹⁷ Act of March 2, 1895, 28 Stat. at L. 963.

¹⁸ Act of June 8, 1872, 17 Stat. at L. 283.

¹⁹ Act of March 2, 1889, 25 Stat. at L. 873.

²⁰ Act of March 2, 1895, 28 Stat. at L. 963.

merce, in the Tariff of 1842 which prohibited the importation into this country of obscene literature or pictures.²¹ It has been more effectively dealt with, however, through the postal power. Regulation by excluding such matter from the mails dates back to 1865.²² The first really effective legislation on the subject was in 1873.²³ Since then various amendments have been added.²⁴ The subject is now covered by two sections of the Criminal Code.²⁵ One of these sections makes unmailable obscene or indecent literature, letters, pictures, etc. The other section forbids the mailing of matter which would reflect injuriously upon the character of another.²⁶

By an act of 1912 the importation of prize fight films for the purpose of showing them at public exhibition in this country was prohibited.²⁷ This act also forbade under penalty the sending or receiving of such films in interstate commerce or through the mails for the purpose of publicly exhibiting them. This has been an effective means of prohibiting such exhibitions. For while Congress cannot directly prohibit exhibitions of this kind, it can practically make them impossible by forbidding the sending of the films to places where they are to be exhibited.²⁸

²¹ Act of Aug. 30, 1842, 5 Stat. at L. 548, sec. 28.

²² Act of March 3, 1865, 13 Stat. at L. 504, sec. 16.

²³ Act of March 3, 1873, 17 Stat. at L. 598.

²⁴ Act of July 12, 1876, 19 Stat. at L. 90; Act of Sept. 26, 1888, 25 Stat. at L. 496; Act of May 27, 1908, 35 Stat. at L. 416; Act of March 4, 1911, 36 Stat. at L. 1339.

²⁵ United States Criminal Code, Act of March 4, 1909, 35 Stat. at L. 1129, secs. 211, 212.

²⁶ The regulation of public morals is considered at more length in Chapter VIII.

²⁷ Act of July 31, 1912, 37 Stat. at L. 240.

²⁸ The frequent violations of this law have been due to a lack of severity in the penalty. The fines imposed have practically amounted to a federal license to show the pictures.

Regulations purporting to exclude obscene literature and prize fight films from the mails have been motivated by a desire to insure society against influences which are popularly believed to be injurious. By making postal regulations Congress has also sought to insure the safety of the state by excluding from the mails seditious and treasonable literature. It is quite logical that a government should not lend one of its agencies to the furtherance of its own overthrow or destruction and the constitutionality of such regulations can hardly be questioned. The suppression of seditious publications has taken place in time of war when the nation was in peril. During the Civil War the Executive acted without authority of statute, but with the acquiescence of Congress. In the obscene literature Act of 1872 "disloyal" devices were included among the articles excluded from the mails,²⁹ but when the act was amended in the following year this phrase was left out.³⁰ During the recent war Congress enacted sweeping legislation dealing with the problem. The Espionage Act of 1917 declares unmailable any matter which violates the provision of the act or which urges "treason, insurrection, or forcible resistance to any law of the United States. . . ." ³¹ By an amendment to the Espionage Act in 1918 the postmaster general was authorized during the war to withhold mailing privileges from persons whom he concluded were using the mails in violation of the provisions of the Espionage Act.³²

Finally, among the postal regulations which have been

²⁹ Act of June 8, 1872, 17 Stat. at L. 302.

³⁰ Act of March 3, 1873, 17 Stat. at L. 598.

³¹ Act of June 15, 1917, 40 Stat. at L. 230.

³² Act of May 16, 1918, 40 Stat. at L. 553.

enacted for purposes other than the improvement of the service may be added those which would forbid the postal system to be used as an agency for the violation of certain federal and state laws. The regulations pertaining to fraudulent matter make it unlawful to use the mails to distribute counterfeits of the money or securities of the United States.³³ Congress can, of course, protect its own currency and punish counterfeiting and has done so. But in excluding counterfeit currency and securities from the mails it took an additional precaution to prevent an agency under its control from unwittingly aiding in the violation of federal law. In the same way Congress has forbidden the use of the mails to publications which violate copyrights granted by the United States.³⁴ The instances when Congress has used its postal power to prevent the violation of federal law, however, are rare. It is interesting to contemplate to what extent Congress might go in this direction in the enforcement of such legislation as anti-trust measures, railway legislation, food and drug regulations, etc. But it hardly seems probable that postal regulations of this kind will be carried further than to cases where there is a very close relationship between the violation of the law and the use of the mails.

There are also instances where the postal service has been closed to those who would use it in violating or evading state law. Such a regulation of the mails was proposed as early as 1836 by Calhoun during the controversy over the slavery question. The proposal of Calhoun was aimed at abolitionist publications and would have made it unlawful for any postmaster to re-

³³ Act of March 2, 1889, 25 Stat. at L. 873.

³⁴ Act of March 3, 1879, 20 Stat. at L. 355, sec. 15.

ceive or send through the mails any publication addressed to a state in which its circulation was prohibited by state law.³⁵ In recent years there is at least one instance where the federal government has forbidden the use of the mails for purposes of violating state law. This is the act which prohibits the circulation through the mails of liquor advertisements in states where by state law it is illegal to advertise or solicit orders for intoxicating liquor.³⁶

Postal regulation dealing with lotteries, obscene literature, and prize fight films obviously are not enacted for the purpose of maintaining and improving the efficiency of the postal service. In this they differ from the regulations to insure the government monopoly, or to protect the mail in transit. The latter are essential to the highest efficiency of the service itself and the power of Congress to make such regulations has never been seriously questioned. But a lottery ticket, a lewd picture, or a prize fight film is not injurious *per se* in the same way as a highly inflammable article. There is nothing about a lottery ticket or a picture that would injure the other mail or endanger the employees in the postal service. Regulations excluding such articles from the mails obviously are made to protect public morals. The question then arises, Can Congress refuse mailing privileges in order to protect public morals?

Postal regulations for the protection of public morals have been attacked on a number of grounds, but the constitutionality of the legislation has been uniformly sustained. In at least two decisions the Supreme Court has said that excluding lottery tickets or circulars from the

³⁵ 12 Debates of Congress, 383. This bill did not pass.

³⁶ Act of March 3, 1917, 39 Stat. at L. 1069.

mails is a valid postal regulation.³⁷ The regulations excluding fraudulent matter have also been sustained by the Supreme Court.³⁸ The validity of excluding obscene literature has been sustained in the inferior courts,³⁹ and, while never attacked before the Supreme Court, that tribunal has referred to it as a reasonable regulation,⁴⁰ and has interpreted it in its application.⁴¹ The regulation excluding prize fight films from the mails has not been contested. The validity of prohibiting the importation of such films, however, has been sustained,⁴² and, to use the emphatic language of Professor Cushman, "There can be no doubt whatever that that portion of the act which authorizes the exclusion from the mails would be sustained by the Supreme Court should its constitutionality be questioned."⁴³ The constitutionality of excluding seditious and treasonable publications has not been questioned. The legality of vesting officials of the post office department with power to determine what constitutes seditious and treasonable publications and to withhold mailing privileges has been upheld in the lower courts.⁴⁴ The power of Congress to prevent the postal facilities from being used to violate a federal law, such as using the mails to distribute counterfeit coin,

³⁷ *Ex parte Jackson*, 1877, 96 U. S. 727; *In re Rapier*, 1892, 143 U. S. 110.

³⁸ *Public Clearing House v. Coyne*, 1903, 194 U. S. 497.

³⁹ *U. S. v. Wilson*, 1893, 58 Fed. 768; *U. S. v. Warner*, 1894, 59 Fed. 355.

⁴⁰ *Public Clearing House v. Coyne*, 1903, 194 U. S. 497.

⁴¹ In *United States v. Dunlap*, 1897, 165 U. S. 486, this regulation was upheld as applicable to the veiled advertisement of prostitutes.

⁴² *Weber v. Freed*, 1915, 239 U. S. 325.

⁴³ Robert E. Cushman, "The National Police Power," in *Minnesota Law Rev.*, May, 1920, p. 415.

⁴⁴ *Masses Publishing Company v. Patten*, 1917, 244 Fed. 535; *Jeffersonian Publishing Company v. West*, 1917, 245 Fed. 585.

can hardly be questioned. It might be contended that this would amount to double jeopardy. The courts, however, would probably hold that in such a case the act of counterfeiting and the act of sending counterfeit coin through the mails are two distinct offences. Excluding matter which might be used in violation of state laws from the mails offers a more difficult problem. Such legislation was upheld, however, with reference to an interstate commerce regulation,⁴⁵ and in view of this it would seem probable that it would be upheld as a postal regulation when one considers that Congress exercises a greater degree of control over the postal service than it does over interstate commerce.

In considering the constitutionality of postal regulations an important fact must be borne in mind, namely, the proprietary interest of the federal government in the postal system. In the regulation of interstate commerce Congress has dealt with agencies which, although engaged in public service, are privately owned and operated. But the government owns and operates the postal system. Consequently it can go farther in its postal regulations than it can in the regulations of interstate commerce. The courts have taken notice of this distinction between postal regulations and interstate commerce regulations. In the Jackson case it was said, "But we do not think Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails."⁴⁶

Since the government is the sole owner and operator of the postal system there devolves upon it the duty to

⁴⁵ Clark Distilling Company v. Western Md. Ry. Co., 1917, 242 U. S. 311, upholding the Webb-Kenyon Act.

⁴⁶ *Ex parte Jackson*, 1877, 96 U. S. 727, at 735.

see that this public service is faithfully performed. Through the agency of the postal system millions of homes are reached. If lottery tickets, obscene literature, or letters aiming to defraud are brought into these homes through the mails the government is serving as an agency in the furtherance of practices which public opinion condemns. In refusing to lend an agency which it maintains and operates for the distribution of articles which tend to corrupt public morals, Congress is not only exercising a right but is performing a duty.

But while the government has a proprietary interest in the postal system, this does not vest it with power to make whatever regulations it chooses to make. Constitutional limitations apply to postal regulations. The Fourth Amendment secures the people "against unreasonable searches and seizures." The court has asserted that were Congress to authorize the postal authorities to open sealed matter, it would be a violation of this amendment.⁴⁷ Likewise it would unquestionably be held a violation of the constitutional guaranty of religious freedom if Congress should admit the periodicals of one religious denomination and exclude those of another. The principal constitutional limitation to regulation of the postal service, however, appears to be the guaranty of due process of law. The Supreme Court has viewed the right to use the mails as a property right which could not be taken away without due process of law.⁴⁸ It has also been said by the court that "Due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of govern-

⁴⁷ *Ex parte Jackson*, 1877, 96 U. S. 727, at 733.

⁴⁸ *Allgeyer v. Louisiana*, 1897, 165 U. S. 578.

ment.”⁴⁹ Taking this view of due process it seems clear that if there were arbitrary discriminations in the granting of mailing privileges it would constitute a violation of the Fifth Amendment. This position is strengthened by the inability of the postal authorities to act in an arbitrary manner in issuing fraud orders or in denying mailing privileges.⁵⁰

Proposals have been made to use the postal power to introduce reforms which are entirely foreign to the mail service and over which the federal government cannot constitutionally exercise a direct control. Thus in 1918 two bills were introduced into Congress by Senator Kenyon providing for a denial of postal privileges to employers of children below a certain age.⁵¹ The constitutionality of proposals of this kind offers an interesting subject for speculation. Obviously there is a distinction between excluding lottery tickets from the mails

⁴⁹ *Geozza v. Tierman*, 1893, 148 U. S. 657, at 662.

⁵⁰ *American School of Magnetic Healing v. McAnnulty*, 1902, 187 U. S. 94; *Masses Publishing Company v. Patten*, 1917, 244 Fed. 535; *Jeffersonian Publishing Company v. West*, 1917, 245 Fed. 585.

Professor Cushman has admirably pointed out the relation of due process to postal regulations. “While a person may not be in a position to compel the government to extend a privilege at all, he does have a constitutional right to enjoy it on equal terms with others who stand in the same general relation to the government as he does. It may not be a “liberty” within the meaning of the due process clause to be able to mail a letter or a book provided nobody else can do so. But if the government has created facilities for mailing letters and books it is a “liberty” within the meaning of the due process clause to use those facilities on equal terms with other persons of the same class. It is in this sense of the word that the use of the postal system has been declared to be part of the “liberty” secured by the fourteenth [the fifth amendment is more applicable] amendment against deprivation without due process of law. In short, the due process clause operates as a limitation upon the power of Congress to make classifications which are arbitrary in character in respect to the enjoyment of mail privileges.” *Op. cit.*, pp. 428-9.

⁵¹ Sen. bills 4732, 4760, *Cong. Rec.* vol. 56, p. 8341.

and denying a person who conducts a lottery the use of the mails for innocent matter. In the one case Congress merely refuses to lend an agency under its control to assist him in conducting the lottery. In the other case it imposes a penalty upon him for conducting the business. The sending of lottery tickets through the mail might tend to injure public morals, but no such injury could possibly result from innocuous correspondence coming from one who conducts a lottery. The regulation of child labor offers even a better comparison. Even the products of child labor are no more harmful than are similar products made by adults and the public could not possibly be injured by receiving them through the mails. To deny a person the privilege of using the postal system for innocent purposes because he employs children would be to impose a penalty for employing children. Congress then could lay down a course of business in enterprises over which it had no control, and if the employer digressed from that course he would be penalized by a forfeiture of his postal privileges. When one considers that the federal government has an absolute monopoly in the postal service and when one notes how vitally important the postal service is in modern business, it appears conclusive that if such legislation as that proposed by Senator Kenyon were constitutional, practically every activity now controlled by the states would be subject to federal regulation. However, in the light of the recent child labor decisions it does not seem probable that such legislation would be sustained by the courts. The Supreme Court would probably hold that legislation which lays down certain standards in business and penalizes a digression from those standards by a withdrawal of postal privileges is not a postal regulation

at all but is rather an attempt to regulate matters entirely foreign to the postal service.

We come now to a consideration of the third class of regulations, namely, the measures for improving highways in the states with the aid of federal grants of money. The building of highways by the federal government is by no means a new thing. During the first half century of its existence Congress frequently made appropriations for highways. In 1838, when the last appropriation was made for the famous Cumberland Road, Congress had appropriated some seventeen million dollars for improvement of roads. With the advent of the railroad such appropriations became less necessary and from 1838 to 1893, except for minor improvements by the War Department, federal expenditures for highways stopped altogether.⁵²

It was not until the federal aid act of July 11, 1916,⁵³ that the federal government launched out on its present extensive program of improving highways by coöperating with the states. That the postal clause was intended as the constitutional basis for this act is indicated by the title. This reads, "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes." Section two of the

⁵² Even during the period from 1806, when the first appropriation for the Cumberland Road was made, to 1838, when such appropriations were abandoned, there was considerable opposition to the federal government undertaking such projects. President Monroe, doubting the constitutionality of making appropriations for local improvements, vetoed the Cumberland Road appropriation in 1822. For the veto message of Monroe see James D. Richardson, *Messages and Papers of the Presidents*, vol. II, p. 167. President Jackson, in a vigorous message, vetoed the measure appropriating money for the Maysville Road. Jackson contended that the appropriation was for a local project which was not generally beneficial to the nation. *Ibid.*, p. 483.

⁵³ Stat. at L. 355.

act enlarges upon this by providing "That for the purpose of this Act the term 'rural post road' shall be construed to mean any public road over which the United States mails now are or may hereafter be transported. . . ." This makes it broad enough in its application to include any rural public highway.⁵⁴ This act made an appropriation of \$75,000,000 to be distributed over a five-year period. Before the close of this period the total appropriations had amounted to some \$275,000,000.

At the end of the five-year period provided for by the act of 1916, the "Federal Highway Act" was passed.⁵⁵ This act followed along the same lines as the act of 1916 and a brief analysis of its provisions will show the methods employed by Congress to promote road building in the guise of providing post roads. Like the act of 1916 it provides for an appropriation to be distributed among the states. In determining the amount each state shall receive three equally important factors must be considered: population, area, and mileage of rural free delivery routes. For the state to receive its share of the federal fund it must conform with certain requirements stipulated in the Act. These requirements are as follows: (1) The state must have appropriated a fund for highway purposes equally as large as that which it receives from the federal government. (2) The state highway department must designate the roads on which the money is to be spent and this must be approved by the Secretary of Agriculture. These roads must not exceed seven per cent of the road mileage of the state and in approving the plans the Secretary of Agriculture is to

⁵⁴ Streets of cities are expressly excluded by section 2.

⁵⁵ Act of Nov. 9, 1921, 39 Stat. at L. 355.

give preference to those which will facilitate an interstate highway system.⁵⁶ (3) The plans and specifications for the proposed road must be approved by the Secretary of Agriculture. (4) The state must maintain the highway constructed under this plan.⁵⁷

The result of this legislation has been remarkable. Toward the close of the year 1921 it was estimated that about one half of the roads being built in the United States were aided financially by the federal government and the construction was subject to the inspection and approval of federal engineers.⁵⁸ It was also estimated that the construction of these roads at that time gave employment to 250,000 men, either directly in road construction or indirectly in production and transportation of material.⁵⁹ The states have been ready to take advantage of the federal offer. It has also served as a stimulus for the states and localities to undertake the improvement of highways on their own initiative.

⁵⁶ The act, however, provides that these interstate highways must not exceed three-sevenths of the total mileage of the state and that not more than sixty per cent of all the federal aid allotted to any state shall be expended upon the interstate highways until provision has been made for the entire system of such highways except with the approval of both the Secretary of Agriculture and the State Highway Department.

⁵⁷ Section 14 provides "That should any state fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State Highway Department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in a proper condition of maintenance and charge the cost thereof against the federal funds allotted to such state, and shall refuse to approve any other project in such state, except as hereinafter provided." These provisions are that the state must reimburse the federal government for repairing the road before the Secretary of Agriculture will again approve funds for the state.

⁵⁸ *Banker and Farmer*, Dec. 1921.

⁵⁹ *Ibid.*

However, the scheme also has had its difficulties. It is significant that in August, 1921, a resolution was introduced into the Senate calling for an investigation of the workings of the federal highway law.⁶⁰ This resolution stated that there were charges of extravagance and waste of federal funds and equipment in the states.⁶¹ It was also charged that some states, counties and municipal corporations had been induced to issue bonds and incur indebtedness in large sums upon the expectation that Congress would appropriate a like amount of money and that this had "promoted imprudent and wasteful expenditures on ill-considered and poorly planned road projects." These charges show a weakness in the scheme of federal aid on a dollar for dollar basis.⁶² Feeling that it is getting something for nothing from a source far removed from its immediate interests, a local community is not likely to practice the same husbandry that it would if it had to bear the entire financial burden itself. The feeling that every dollar appropriated for highway purposes really means two dollars available for such purposes also is apt to be too great a temptation to the legislators in the states.⁶³

⁶⁰ Senator King's Resolution (S. J. Res. 113) *Cong. Rec.*, August 23, 1921, vol. 61, p. 5543.

⁶¹ The surplus war material suitable for road work had been distributed among the states by the act of March 15, 1920, 41 Stat. at L. 530.

⁶² This scheme is considered more at length in connection with federal regulation of education. *Infra*, chapter IX.

⁶³ The scheme appears not to have been entirely satisfactory to the states. A recent newspaper report notes that in Nebraska the lower house of the legislature passed a resolution condemning the plan of the state "matching dollars" with the federal government for the building of roads. Both houses ordered an investigation of charges of waste and extravagance in the building of federal aid roads and a committee was appointed for this purpose. *Christian Science Monitor*, Jan. 30, 1922.

The constitutionality of this legislation has not been tested in the courts. Even to a casual observer it must seem clear that the provision for rural delivery mail routes was merely an incidental factor in the plan for general highway improvement. The attention given to interstate and intercounty highways and roads between the more important centers of population would show that improvement of rural mail routes is not the real purpose of the legislation. Rural mail routes do not extend along the more traveled highways but lead into the less frequented neighborhoods. Highway legislation of the sort enacted by Congress was the outcome of the "good roads movement" which was given an impetus by the advent of the automobile and the resultant desire for better overland routes between different points.⁶⁴ But there is a reasonable relationship between a system of highways on a national scale and mail routes, and if the federal highway legislation were contested the courts would probably hold that this relationship is close enough to reconcile the legislation with the Constitution.⁶⁵

To summarize, certain points should be noted in connection with the postal clause as a basis for federal legislation.

(1) When the Constitution was framed, federal regulation of the postal system had already been tried out and found satisfactory. Consequently in the Constitutional Convention there was no serious opposition to vesting this power in the central government.

(2) The government has established and maintained an

⁶⁴ As early as 1908 the American Highway Association suggested that the federal government should build 150,000 miles of highways.

⁶⁵ For a recent summary of federal highway legislation, see A. F. Macdonald, *Federal Subsidies to the States*, Philadelphia, 1923.

absolute monopoly in the postal service. This monopoly has been considered necessary for the good of the service.

(3) The government has a proprietary interest in the postal system which it owns and operates. This proprietary interest has given it a greater degree of control over the postal service than it has over interstate commerce.

(4) Because of the monopolistic and proprietary nature of its control, certain rights and duties have devolved upon the federal government with reference to the postal service. Not only may it make regulations for the improvement of the postal service, but it may refuse to lend the postal system to the furtherance of practices which tend to injure public health, morals, and safety.

(5) While the government has a proprietary interest in the postal service, it cannot make arbitrary regulations as such regulations would be considered repugnant to due process of law.

(6) Proposed legislation to make postal privileges contingent upon the observance of police regulations enacted by Congress would probably not be sustained as valid postal regulations.

(7) Under its power to establish post roads Congress has aided and stimulated the states to undertake a program of systematic highway construction throughout the United States.

CHAPTER VI

THE TREATY POWER — CONCLUSIONS

THE meaning commonly conveyed by the term "Treaty Power" is that it is the power of the United States to enter into agreements with other nations. At first glance it would appear that such agreements would have no bearing upon the relationship of the federal government to the states. But in entering into international agreements the federal government assumes obligations, and to carry out these obligations it may have to interfere in matters which are commonly considered as belonging exclusively to the jurisdiction of the states. There is thus a conflict of jurisdictions, in which event the state usually must yield to the central government. Professor Corwin has devoted a volume to an exhaustive treatment of this phase of the treaty power.¹ Like the taxing power and the power to regulate interstate commerce, the treaty power furnishes a constitutional means for the extension of federal authority. Consequently the subject merits a brief consideration here.

The lack of federal supremacy with regard to the treaty power was one of the principal weaknesses of the Articles of Confederation.² To remedy this weakness

¹ Edward S. Corwin, *National Supremacy*, N. Y. 1913. The two other principal authorities on the subject of the treaty power are Charles H. Butler, *Treaty-Making Power of the United States*, 2 vols., N. Y. 1902; Robert T. Devlin, *The Treaty Power*, San Francisco, 1908.

² Even under the Articles of Confederation believers in a stronger central government, such as Hamilton, Jay, and even Jefferson, con-

the framers of the Constitution included treaties, along with the Constitution and federal statutes, as the "supreme law of the land."³ The states were expressly forbidden to enter into agreements with foreign countries⁴ and could not enter into agreements among themselves except with the consent of Congress.⁵ The members of the Constitutional Convention were not unmindful that they were clothing the federal government with a far-reaching power when they conferred upon it the sole power of making treaties. It was also considered probable that in the exercise of this power the federal government might come into conflict with the states. Probably for this reason it was provided that no treaty should be made without the consent of two-thirds of the Senate, a body in which the states were to be equally represented.⁶

In the Chinese Exclusion Case the Supreme Court made the assertion that, "For local interests, the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."⁷ The same court, however, has also said, "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear."⁸ Just what constitutes proper

tended for the supremacy of federal treaties and maintained that the individual states should not determine their own obligations under these treaties. For a discussion of this, see Corwin, *National Supremacy*, Chap. III.

³ Art. VI, sec. 2.

⁴ Art. I, sec. 10: 1.

⁵ Art. I, sec. 10: 2.

⁶ Corwin, *National Supremacy*, pp. 63 seq.

⁷ 130 U. S. 581, 1889, at 606.

⁸ *Geofrey v. Riggs*, 1890, 133 U. S. 258, at 266.

subjects of negotiation between governments has never been clearly defined, and it sometimes happens that the subject matter is such that the individual states are concerned. Due to the usual subject matter of treaties, the conflicts between the federal government in the exercise of the treaty power and the states in the exercise of police powers have not been frequent. But whenever such conflicts have arisen the supremacy of the central government has been maintained. The attitude of the Supreme Court is expressed in the early case of *Ware v. Hylton* in the following sentence: "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in the way."⁹

A few instances might be pointed out here to show how it is possible for a treaty to be in conflict with state laws and that the supremacy of the treaty is established in such events. The treaty with France in 1778 removed the incapacity of alienage from French subjects and permitted them to purchase and hold land in the United States.¹⁰ In construing the terms of this treaty the Supreme Court did not consider the laws of the states in which such land might be located to be of any importance.¹¹ Similar provisions to those of the French treaty were contained in the treaty of 1794 with Great Britain.¹² As in the *Chirac* case, the court construed this treaty with little regard for a state law which was in conflict

⁹ 3 Dall. 199, 1796, at 236.

¹⁰ For the terms of this treaty see William M. Malloy, *Treaties, etc., between the United States and other Powers*, 2 vols., Washington, 1910, I, 468.

¹¹ *Chirac v. Chirac*, 1817, 2 Wheat. 259; A similar view of this treaty was taken in *Carneal v. Banks*, 1825, 10 Wheat. 181.

¹² Malloy, I, 590.

with it.¹³ Later decisions are in line with these early opinions. In *Orr v. Hodgeson* the court held that a treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of the state.¹⁴ In *Hauenstein v. Lynham*, the court upheld a treaty as against the laws of a state which secured to Swiss citizens, heirs and owners of land in the United States, certain rights to the proceeds of the sale of such land.¹⁵ Perhaps the most drastic holding is that of *Baker v. Portland* which was tried in an inferior court.¹⁶ This case arose out of an Oregon statute prohibiting the employment of Chinese laborers on the improvement of streets and public works of the state. The court held that such a discrimination was in conflict with the terms of the Chinese treaty. The importance of this decision is emphasized by Professor Corwin as follows: "This decision is about as conclusive, I should say, as one could well ask of the general issue of the relation of the treaty power to State power. For if a State's power to determine whom it shall employ in the *construction of its public works* is limitable by *implied* stipulations of the national treaties, little ground would seem to remain for the doctrine of rights absolutely reserved by the States."¹⁷

Treaties and federal statutes are both made the supreme law of the land by the Constitution. They are thus placed on a plane of equality with respect to supremacy. This was pointed out by Justice Harlan when he said, "It is well settled that in case of a conflict be-

¹³ *Fairfax v. Hunter*, 1813, 7 Cranch, 603.

¹⁴ 4 Wheat. 453, 1819.

¹⁵ 100 U. S. 483, 1880.

¹⁶ 5 Sawyer, 566, 1879.

¹⁷ *National Supremacy*, p. 179.

tween an act of Congress and a treaty — each being equally the supreme law of the land — the one last in date must prevail in the courts.”¹⁸ But while this equality means that, as far as the courts are concerned, a federal statute may set aside a treaty, it does not necessarily mean that Congress can legislate on all the subjects that may be contained in a treaty. In fact, the treaty power may be invoked to regulate subjects which could not be reached by Congress in the exercise of its enumerated powers. This is illustrated by the attempt of Congress to control vice through its powers to regulate immigration. In the *Keller* case¹⁹ the court held that Congress, in its attempt to protect immigrant women, had exceeded its authority, but it was hinted in the opinion that the regulation might be constitutional if made in pursuance of a treaty.²⁰

The power of the President to enter into international agreements, together with the advice and consent of the Senate, is not expressly restricted by constitutional provisions either as to the scope or character of the agreements. The treaty-making power is conferred in general terms and in this it differs from the powers of Congress which are specifically enumerated. The treaty-making power might therefore be invoked to regulate matters which it would not be possible for Congress to reach. It might also be invoked to advance national interests as distinguished from local or sectional interests, and state regulations to the contrary would have to yield to

¹⁸ *Hijo v. United States*, 1904, 194 U. S. 315, at 324. For a similar view see *The Cherokee Tobacco*, 1871, 11 Wall. 616, at 621; *Whitney v. Robertson*, 1888, 124 U. S. 190 at 194; *United States v. Lee Ven Tai*, 1902, 185 U. S. 213, at 221.

¹⁹ 213 U. S. 138, 1909.

²⁰ For a fuller consideration of this case, see chap. VII.

the treaty. In 1913 a federal statute was passed regulating the killing of migratory birds.²¹ This was held unconstitutional in the federal district courts.²² In 1916 the United States entered into a treaty with Great Britain and both powers agreed to protect migratory birds. Congress enacted legislation ancillary to this treaty, and while this legislation was substantially the same as the act of 1913, it was sustained by the Supreme Court.²³

Purely from the standpoint of constitutional law, undoubtedly the federal government could interfere with state powers through the exercise of the treaty power more than through the exercise of one of the powers delegated to Congress. To what extent the treaty power might be exercised is entirely an academic question. The Supreme Court has never declared a treaty unconstitutional. In the past the conflicts between treaties and state laws have arisen mainly over the question of property rights of citizens of other countries residing in the different states. There are a few instances of conflicts over consular regulations. State laws discriminating against aliens also have had to yield if such aliens were guaranteed certain rights by a federal treaty. But it must be remembered that, after all, treaties are international agreements. The "supreme law of the land" provision was inserted to protect the federal government in its international obligations against adverse legislation by the states, and is merely incidental to the principal purpose of a treaty. It is hardly conceivable that the

²¹ Act of March 4, 1913, 37 Stat. at L. 828.

²² *United States v. Shauver*, 1914, 214 Fed. 154; *United States v. McCullagh*, 1915, 221 Fed. 288.

²³ *Missouri v. Holland*, 1920, 252 U. S. 416.

federal government would make use of the treaty power to make sweeping regulations as has been done for instance in railway legislation by Congress through its powers to regulate commerce, or as was attempted by that body when it invoked the taxing power to regulate child labor.

The constitutional provisions vesting the federal government with powers to regulate interstate and foreign commerce, to tax, to make postal regulations, and to make treaties have been the principal constitutional grounds for the extension of federal activities into the sphere of the states. Recently a new means of extending federal control has been found in the granting of federal aid to the states for certain purposes, such as public health and education. It has been observed that in extending such aid to the states for the improvement of highways the action was justified under the power to establish post roads.²⁴ It would be difficult to find any constitutional authorization for the extension of federal aid to the states in the promotion of public health or education, unless one were to attach such a significance to the taxing power or the clause giving Congress power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . ." ²⁵ The extension of federal control through the granting of federal aid is considered in a subsequent chapter,²⁶ and consequently in the present chapter we need only note it in passing.

In concluding this brief review of the constitutional

²⁴ *Supra* chap. V.

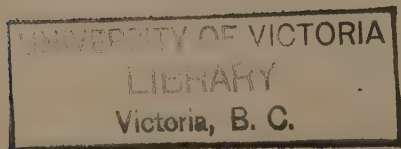
²⁵ Art. IV, sec. 3:2.

²⁶ Chap. IX.

bases for federal centralization it should be noted that such constitutional powers as the power to regulate commerce and the postal service, the taxing power, and the treaty power were vested in the federal government either because they were national in scope and character and inherently lend themselves to central control or because it was necessary to clothe the central government with these powers in order to make it self-sustaining and independent of the states. Experience had shown the framers of the Constitution that the postal service was essentially a federal function. These men also realized that the United States could not retain the respect of other nations if it could not carry out its treaty obligations because of interference by the states, and they provided for national supremacy with respect to treaties. The confusion existing in interstate commerce because of jealousy among the states showed the need of federal control and Congress was authorized to regulate such commerce. Likewise, the sad experiment in public finance under the Articles of Confederation had revealed that an independent source of revenue was indispensable to the very existence of the federal government and the result was that Congress was given power to lay and collect taxes. These powers, then, were given to the federal government either because the functions were national in character or because the powers were necessary to the well-being of the federal government.

The theory of a government of restricted and enumerated powers which is embodied in the context of the Constitution, and which was affirmed by the defenders of the Constitution, certainly contradicts the idea that these powers might be exercised to extend the federal jurisdiction into the domain of the states. A federal

system of government obviously suggests a two-fold jurisdiction, and in a system like ours, where the central government enjoys enumerated powers and the states residual powers, a specific power granted to the federal government serves as a delineation of its jurisdiction. The federal government can exercise only those powers which the Constitution confers upon it. But due to the changed conditions of society and the complexities of modern life these constitutional powers are today exercised under different conditions and with different results than they were when the Constitution was framed. The result is that Congress is constantly enlarging its sphere of activities and frequently legislating on matters which traditionally have belonged to the states. In the exercise of its enumerated powers it has made regulations which are essentially police regulations. The imposition of police regulations has sometimes been the real motive of congressional enactments and some constitutionally enumerated power has been invoked merely to lend constitutional authorization to the legislation. Congress has thus accomplished by indirection what it could not reach directly. Each successive Congress contributes its share of additional regulations and at the close of the session the federal government finds itself burdened with new administrative duties and responsibilities. It is because of this tendency of Congress to enlarge its activities, especially in the field of social and economic legislation, that serious apprehensions regarding federal centralization have been aroused.



PART II
SOCIAL LEGISLATION

CHAPTER VII

REGULATION OF PUBLIC MORALS

IN a sense all legislation is social. In a more restricted sense this term is applied to legislation intended for the relief and elevation of the less favored classes of the community. Liberty has been taken here to apply the term to those subjects which are of sociological interest as distinguished from such subjects as corporations and labor organizations which are usually catalogued in the field of economics. Such an arbitrary classification can of course be justified mainly for methodological reasons. However, legislation in the states dealing with gambling, vice, the liquor traffic, food and drugs, child labor, and compulsory school attendance has as its direct object the preservation of public health and morals. Laws aimed at combinations in restraint of trade are more in the nature of economic regulations and affect health and morals only indirectly. Congress is not empowered by the Constitution to legislate for the welfare of the citizens of the several states, but by a liberal exercise of its constitutionally granted powers it has accomplished this indirectly. In the field of social legislation, as defined here, the main subjects that Congress has attempted to regulate are lotteries, vice, food and drugs, child labor, education, and intoxicating liquor.

A classification of regulatory measures under such headings as public morals and public health is also arbitrary. Regulations of vice may be necessary to insure

public health as well as public morals, and child labor regulations promote public morals as well as public health. The courts have found it necessary, however, to establish certain standards for determining whether legislation is an unwarrantable interference with individual rights or a valid police regulation. Courts have uniformly held that if a state law has for its purpose the promotion of public health, safety, or morals, and if there is a reasonable relationship between the means employed and the ends desired, the legislation is valid. For convenience we can borrow the terminology of the courts and class, as regulations for the promotion of public morals, those congressional enactments which deal with gambling and vice, and, as measures for the promotion of public health, the regulations dealing with food and drugs, and child labor. Educational measures and liquor regulations could also logically be classed as public health or public morals legislation, but owing to the popular interest in these subjects, they warrant special consideration. It is, of course, not contended that the subjects considered here comprise an exhaustive list of the congressional enactments which directly and indirectly have to do with public health or morals. But a consideration of these subjects is sufficient to show that Congress has concerned itself with police regulations and what constitutional powers have been invoked to effect such legislation.

Lotteries. Gambling in its various forms has always been subject to governmental regulations in the United States. It is a practice that no one can engage in as of right. The validity of prohibiting gambling is generally conceded, but the regulation has usually been left to the states in the exercise of their police power. The policy of prohibiting gambling has been adopted by all the

states and some even express it in their constitutions. Suppression of gambling is essentially an exercise of police power — a power not vested in Congress but one which it has assumed through its power to regulate commerce and the postal service. In the exercise of its commerce power to discourage gambling, Congress has sought to suppress lotteries. Antedating the legislation pertaining to food and drugs, vice, and child labor, this regulation is significant in that it was a police regulation rather than a regulation of commerce, and that in this instance the regulation was in form and effect an absolute prohibition against admitting an article as a subject of interstate commerce.

That lotteries are subject to state rather than to federal regulation is illustrated by an early case. In 1812 Congress authorized the city of Washington to conduct a lottery as one of its corporate powers.¹ A statute of the state of Virginia prohibited the sale of all lottery tickets in that state. The state contended that this statute applied to the sale of lottery tickets issued by the Washington lottery even though this lottery was authorized by Congress and the issue of the lottery tickets approved by the President. In the case of *Cohens v. Virginia* ² a conviction under the Virginia statute for selling tickets for the Washington lottery was sustained by the United States Supreme Court. Chief Justice Marshall, who delivered the opinion, stated that in authorizing the lottery Congress was merely giving an incidental corporate power to the city of Washington and that the provision was not designed to conflict with the penal laws of the states.

The postal clause and the commerce clause have served

¹ 2 Stat. at L. 726.

² 6 Wheat. 264, 1821.

as constitutional bases for federal anti-lottery legislation. Postal regulations inimical to lotteries have been on the federal statute books for nearly a century. The validity of these regulations, however, has never been seriously questioned. Regulating commerce to discourage lotteries is a comparatively recent development, but because this method has been questioned before the Supreme Court, and because of the relationship of this particular regulation to the question of interstate commerce in general, this method of regulation has received the most publicity.

During our early history lotteries were looked upon as a legitimate way of raising revenues and were authorized by both the federal government and the states. Public opinion, however, gradually began to condemn the practice and in 1827 Congress passed an act unfavorable to lotteries.³ It is interesting to note that the postal clause evidently was made the constitutional basis for this legislation. The act provided, "That no postmaster, or assistant postmaster, shall act as agent for lottery offices, or, under any color of purchase, or otherwise vend lottery tickets; nor shall any postmaster receive free of postage, or frank lottery schemes, circulars, or tickets."

The act of 1827 was the first instance of Congress refusing to lend its postal facilities or agents to the furtherance of practices which were condemned by public opinion. The next congressional legislation on lotteries did not occur until 1868 and again the practice was attacked through the postal power. This act provided, "That it shall not be lawful to deposit in a post office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or similar enterprises

³ Act of March 4, 1827, 4 Stat. at L. 238.

offering prizes of any kind on any pretext whatever.”⁴ In 1872 it was declared unlawful to use the postal service to further “illegal” lotteries and the postmaster general was authorized to issue a fraud order against any person who conducted a “fraudulent” lottery.⁵ In 1876 this act was amended by striking out the word “illegal” and all lotteries, whether authorized by the states or not, were excluded from the mails.⁶ The word “fraudulent” was retained, however, and according to the opinion of the attorney general, fraud orders could be issued only against such lotteries as were actually fraudulent in character.⁷ In 1890 the law was amended so as to include lottery advertisements in newspapers within its prohibition.⁸ The word “fraudulent,” mentioned above, also was eliminated and the postmaster general was authorized to issue fraud orders to prevent the delivery of registered letters or the payment of money orders to persons known to be conducting lotteries. In 1895 the post office department was authorized to withhold ordinary sealed letters as well as registered letters in such cases.⁹

It was not until 1895 that Congress attempted to suppress lotteries through its powers to regulate commerce. The Act of March 2 of that year forbids under penalty the transportation of lottery tickets from a foreign

⁴ Act of July 27, 1868, 15 Stat. at L. 194 at 196. No appropriations were made to cover the cost of administering this act and no penalty was provided for its violation. Consequently it served rather as an official statement of the attitude of Congress towards an avowed evil than as a law to be enforced.

⁵ Act of June 8, 1872, 17 Stat. at L. 283.

⁶ Act of July 12, 1876, 19 Stat. at L. 90.

⁷ Opinion of Attorney-General McVeigh, (1881).

⁸ Act of Sept. 19, 1890, 26 Stat. at L. 465.

⁹ Act of March 2, 1895, 28 Stat. at L. 963.

country into the United States or from one state into another.¹⁰ The title of this act reads, "An Act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States." This expresses the purpose of the act. The object was to suppress an evil, the regulation of commerce being merely a means to an end. Congress was attempting to do by indirection what it was not directly authorized by the Constitution to do. This is shown by the debates in Congress while the bill was under discussion. Senator Hoar, the author of the bill, stated repeatedly that its purpose was to suppress a form of gambling which Congress had not been able to suppress by forbidding the use of the mails. Nothing was said in either house about the constitutionality of the bill. It apparently was taken for granted that Congress had power to enact a measure of this kind.

The constitutionality of this act came up for consideration in the case of *Champion v. Ames*, better known as the Lottery Case.¹¹ A shipment of lottery tickets by express from Dallas, Texas, to Fresno, California, had been made in violation of the federal statute. The question arose, Could Congress suppress lotteries by prohibiting a person from carrying lottery tickets from one state into another? The court held that lottery tickets are articles of commerce, that the power of Congress to regulate interstate commerce is plenary, and consequently that Congress acted within its constitutional powers when it prohibited these articles of commerce from being transported from one state into another. This opinion

¹⁰ 28 Stat. at L. 963.

¹¹ 188 U. S. 321, 1903.

was handed down by a divided court, three judges agreeing with the Chief Justice in a dissenting opinion.

The decision in the Lottery case has been cited so frequently in subsequent cases involving a consideration of the limitations upon the power of Congress to regulate commerce that it merits at least a brief consideration here. The opinion is important for the liberal definition it gives to the terms "commerce" and "power to regulate." The holding that the power to regulate commerce includes the power to prohibit even when the article of commerce is not noxious *per se* has been frequently cited to sustain subsequent decisions.¹² The dicta in this opinion also are significant because of their extremely liberal attitude towards the power of Congress to define and regulate commerce and incidentally to make police regulations.

Quoting from *Leisy v. Hardin*¹³ the court said, "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognized as subjects of commerce are not such."¹⁴ Chief Justice Fuller, dissenting, took a more moderate view with regard to this and declared that the decision of Congress that certain articles were subjects of commerce was not so conclusive as to preclude judicial inquiry. If we accept the dicta of the majority opinion in the Lottery case, Congress has power to declare what constitutes commerce and then proceed to regulate it.

On the question whether regulation could take the

¹² Prior to this decision an act of Congress prohibiting the interstate transportation of diseased live stock had been upheld. *Reid v. Colorado*, 1902, 187 U. S. 137.

¹³ 155 U. S. 100, at 125. 1890.

¹⁴ 188 U. S. 321, at 361. 1903.

form and effect of prohibition the majority opinion stated that this depended on the nature of the traffic to be regulated. It declared that "the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution."¹⁵ The court then declared there was nothing in the Constitution to prevent regulation having the effect of prohibition except the Fifth Amendment and that this did not apply since conducting a lottery is a business which no one is entitled to pursue as of right. These dicta and similar ones expressed later in the case of *Clark Distilling Company v. Western Md. Ry. Co.*,¹⁶ would lead to the conclusion that if a person has no constitutional right to traffic in certain articles, those articles may be excluded from interstate commerce.

The majority opinion in the Lottery case practically declared that the power of Congress to regulate interstate commerce and the power of the states to make police regulations may be exercised for similar purposes. It declared, "As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the widespread pestilence of lotteries and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another."¹⁷

However, after giving expression to such dicta, which might prove sweeping in their application, the court care-

¹⁵ 188 U. S. 321, at 356.

¹⁶ 242 U. S. 311. 1917.

¹⁷ 188 U. S. 321, at 357.

fully guarded itself and the majority opinion is concluded with the following qualifying language: "The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States, Congress — subject to the limitations imposed by the Constitution upon the exercise of the powers granted — has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress." ¹⁸

The Lottery Case is of interest mainly for its general application to the question of congressional control over interstate and foreign commerce. Gambling remains and will probably continue to remain a subject for state regulation. Only certain forms of gambling will lend themselves to control by the federal government through its power to regulate commerce or the postal service. The states will still regulate but Congress also will exercise an influence by refusing to lend the agencies under its control to further practices which it disapproves. So long as gambling is universally disapproved this dual regulation will not lead to conflict. The federal prohibi-

¹⁸ 188 U. S. 321, at 363-364.

tion assists rather than retards the states in their regulations.

Vice. Under the old English law the safeguarding of domestic regularity and the suppression of practices which would lead to moral laxity were left to the province of ecclesiastical jurisdiction. The state considered that the preservation of public morals was not a secular function, but belonged to the church. After the relaxation of church discipline the regulation of vice became a subject for legislation. However, until recently there was not an aggressive policy towards vice. It was placed outside of legal protection, but otherwise tolerated as long as outwardly disorderly practices were avoided. But with the advent of democracy with its attendant exaltation of homely virtues the legislative policy towards commercialized vice became more aggressive.¹⁹ In the United States the regulation of vice, being a police regulation, was left to the states. But Congress through its power to regulate commerce and the postal service has endeavored to suppress this evil and notable legislation has been enacted on the subject.

As in the case of lotteries, congressional legislation to discourage vice has taken the form of postal and commerce regulations. Postal regulations excluding obscene literature and other articles injurious to public morals date back to as early as 1865.²⁰ Since then various amendments have been added, the principal one being in 1873,²¹ and the subject has been covered by the Criminal Code.²² Regulations through the commerce power, how-

¹⁹ See Ernst Freund, *Standards of American Legislation* (Chicago, 1917), pp. 18, 19.

²⁰ Act of March 3, 1865, 13 Stat. at L. 504, sec. 16.

²¹ Act of March 3, 1873, 17 Stat. at L. 598.

²² Act of March 4, 1909, 35 Stat. at L. 1129, secs. 211, 212.

ever, have affected persons more directly and consequently have been contested in the courts and have received a greater publicity.

In attempting to discourage immoral practices Congress has sought to regulate the transportation of (1) objectionable articles, literature, etc.; and (2) persons engaged in objectionable practices. Legislation in the United States has always been influenced by puritanical ideals and the exclusion of obscene matter dates back to as early as 1842. In that year a law was enacted forbidding the introduction of obscene matter from abroad.²³ However, it was not until 1897 that penalties were imposed for using the channels of interstate commerce for the exchange of obscene matter.²⁴ Section 245 of the Penal Code²⁵ now forbids the sending through foreign or interstate commerce by means of an "express company or other common carrier," of "any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use, or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made. . . ." ²⁶

²³ 5 Stat. at L. 562, sec. 28.

²⁴ Act of Feb. 8, 1897, 29 Stat. at L. 512.

²⁵ 35 Stat. at L. 1138.

²⁶ This section was drawn from an Act of Feb. 8, 1897, 29 Stat. at L. 512, as amended by an Act of Feb. 8, 1905, 33 Stat. at L. 705, both the amended and the amending acts being replaced by this section of the Penal Code.

Very little litigation has resulted from this provision of the Penal Code. The Supreme Court had not passed upon the constitutionality of the acts from which this section was taken. In an inferior court, however, it was held that the former act on which this section of the Penal Code was based was constitutional and was not an attempt to legislate on any matter to which the police power of the several states alone extends. The lower court decided it was a valid exercise of the power given to Congress by the commerce clause, which includes the power to declare what may be the subject of commerce.²⁷ In the case of *Clark v. United States* ²⁸ the court held that this section of the Penal Code is a valid exercise of congressional power, and is not unconstitutional as an abridgment of the press.²⁹

In regulating the transportation of persons in foreign and interstate commerce in order to suppress vice, Congress has made use of both its power over immigration and over interstate commerce. The authority of Congress over the general subject of immigration is plenary; it may exclude aliens altogether, or prescribe the terms and conditions under which they may come into or remain in the country.³⁰ In the exercise of its authority Congress has sought to exclude aliens from coming into the United States for immoral purposes and to protect immigrant women against being procured for illicit callings.

²⁷ *United States v. Popper*, 1899. 98 Fed. 423.

²⁸ 211 Fed. 916. 1914.

²⁹ Further provisions relating to the importation of obscene books and articles were made by the Underwood Tariff Act of Oct. 3, 1913, ch. 16, sec. IV G.

³⁰ *Lapina v. Williams*, 1914, 232 U. S. 78; *Turner v. Williams*, 1904. 194 U. S. 279.

Among those excluded by the second section of the general immigration act of 1907 are "prostitutes, or women and girls coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who are supported by or receive in whole or in part the proceeds of prostitution; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose."³¹ The third section of this act went a step farther and, not only forbade the importation into the United States of alien women for immoral purposes, but provided that any alien woman who is guilty of prostitution within three years after coming into the United States shall be deemed unlawfully in the country and deported.³² The third section also provided that "Whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars."

This last quoted provision of the act was declared unconstitutional in the case of *Keller v. United States*.³³ The owners of a house of prostitution in Chicago were indicted for a violation of this provision for harboring in their house a Hungarian woman. This woman had come to New York in November, 1905. She did not come to Chicago until October, 1907, and was already

³¹ 34 Stat. at L. 898.

³² 34 Stat. at L. 898 at 899.

³³ 213 U. S. 139. 1909.

in the house when the place was purchased by Keller in November, 1907. The defendants did not know her until November, 1907. The court held that, "in view of these facts the question of the power of Congress to punish those who assist in the importation of a prostitute is entirely immaterial."³⁴ The court then went on to state that throughout the country there were millions of aliens, and that if Congress had power to control all dealings of our citizens with resident aliens it would mean that "an immense body of legislation which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken away from them. . . . Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution."³⁵ A dissenting opinion written by Justice Holmes, with whom Justices Harlan and Moody concurred, would have permitted such an invasion of the jurisdiction of the states and declared that "If Congress can forbid the entry and order the subsequent deportation of professional prostitutes, it can punish those who coöperate in their fraudulent entry. . . . The same power must exist as to co-operation in an equally unlawful stay."³⁶

The effect of the decision in the Keller case was to limit the power of Congress over the subject of immigration. The court held that the Constitution conferred on the federal government no power to regulate the ordinary affairs and relations of aliens after they have taken up residence. They then become subject to the jurisdiction of the states. Such an interpretation is significant

³⁴ *Ibid.*, pp. 147-148.

³⁵ *Ibid.*, pp. 148, 149

³⁶ *Ibid.*, p. 150.

when one considers, as the court did, that there were about ten million persons of foreign birth in the United States. If Congress in the guise of protecting immigrants could extend its control over all these persons it might regulate all their relations for a period of three years regardless of the laws of the states in which these persons resided. The federal government could then exercise a serious influence within what is popularly considered as the province of state jurisdiction. On the other hand, it is necessary that Congress should have extensive powers over the subject of immigration as a national question because treaties with other countries obligate the federal government to protect their nationals within the borders of the United States. It was also repugnant to public opinion in the United States that an alien woman, who because of ignorance of our language and customs might become easy prey for a procurer, could not be sufficiently protected by the government of the United States. In order to remedy this situation the part of the third section of the general immigration law which had been held unconstitutional in the Keller case was amended and the White Slave Traffic Act of 1910 was enacted.

The section as amended by the Act of March 26, 1910,³⁷ does not contain the "three year" provision with reference to harboring an alien prostitute, but it forbids the importation of an alien woman for an immoral purpose and the harboring of such a woman for an immoral purpose "in pursuance of such illegal importation." The amendment also provides that, not only alien prostitutes, but any alien having an interest in commercialized vice is subject to deportation. On account of the

³⁷ 36 Stat. at L. 264.

White Slave Traffic Act which was subsequently passed and which deals with the problem of alien prostitutes harbored in American houses, the only litigation resulting from this section as amended has involved the question of deportation of aliens. In the case of *Zakanaite v. Wolf*,³⁸ the constitutionality of the measure was attacked on the ground that the act vests in the federal authorities the right to try an immigrant for a violation of the penal laws of a state and consequently interferes with the police power of the state. The court held that Congress has power to deport, and that the determination of fact that might constitute a crime under local law is not a conviction of a crime, nor is the deportation a punishment; it is simply a refusal by the federal government to harbor persons it does not want. In the case of *Looe Shee v. North*³⁹ it was held that evidence that an alien woman was found practicing prostitution within three years after her entry was evidence that she was illegally admitted, and that she was therefore subject to deportation. While the three year period with reference to penalizing a person harboring an alien woman was modified by the amendment, it still remains as a period of probation for an alien and the alien may be deported during this period. This was the holding in the *Zakanaite* case.⁴⁰

The Mann White Slave Traffic Act⁴¹ which was approved June 25, 1910, has a twofold purpose. It aims

³⁸ 226 U. S. 272. 1912.

³⁹ 170 Fed. 566. 1909.

⁴⁰ The manner of deporting aliens was not provided for in the third section of the general immigration law of 1907. Provisions for deportation were included in the 20th and 21st sections of this act and in the *Zakanaite* case these were held not to have been affected by the decision in the *Keller* case.

⁴¹ 36 Stat. at L. 825.

to prevent the practice of prostitution by immigrant women and the harboring of such women for immoral purposes. It also aims to prevent the interstate transportation of women or girls for immoral purposes. In the Keller case the court, in declaring unconstitutional the provisions for punishing persons harboring alien women engaged in illicit practices, had suggested that a modified form of protection of immigrants might be constitutional if made in pursuance of a treaty. Congress acted upon this suggestion in enacting the Mann Act. An international agreement with some thirteen powers for the mutual protection of alien women and the deportation of those engaged in immoral practices had been signed at Paris in 1904.⁴² In urging the adoption of this bill in Congress, Mr. Mann declared that a section of the bill is based upon this "international agreement for the suppression of the white-slave traffic, and, in the opinion of the majority of our committee, may be quite effective in a way that is not possible to reach under the Constitution."⁴³ The section referred to by Mr. Mann requires the registration, by any person harboring alien women engaged in vice, of all such women within three years after they enter the United States. This information is received in the office of the Commissioner General of Immigration. Since prostitution within three years of entry is a ground for deportation this provision should serve the same purpose as the provision in the law of 1907 which was declared unconstitutional in the Keller case. Upon receiving the information desired the federal authorities could proceed to deport an alien woman and the procuring of alien

⁴² For this agreement, see 35 Stat. at L. 1979.

⁴³ *Cong. Rec.* vol. 45, Pt. 1, p. 805.

women for immoral purposes would be discouraged. However, commercialized vice is now outlawed by most of the states and a person operating a resort in violation of state law is not likely to give any information to the federal authorities regarding the inmates.

The other sections of the White Slave Traffic Act deal with the interstate transportation of women for immoral purposes. These forbid any person from assisting or encouraging any woman or girl to go from one place to another in interstate or foreign commerce for immoral purposes. The constitutionality of these provisions was considered in the case of *Hoke and Economides v. United States*.⁴⁴ The defendants in this case were indicted for having violated the White Slave Traffic Act in that they had persuaded a woman to go from New Orleans, Louisiana, to Beaumont, Texas, for the purpose of engaging in prostitution. They contended that the right to travel from one state into another was one of the privileges and immunities of citizenship secured by the Constitution⁴⁵ and that it was not a crime to assist a person in doing what she had a legal right to do. They also contended that suppression of vice was an exercise of police power not vested in the federal government and that this was an unconstitutional exercise of the power to regulate commerce. The court declared that by the commerce clause Congress was given the power to regulate the transportation of persons in interstate commerce and that "what the act condemns is transportation obtained or aided or transportation induced in interstate commerce for the immoral purposes

⁴⁴ 227 U. S. 308. 1913.

⁴⁵ Art. IV, sec. 2.

mentioned.”⁴⁶ It held that Congress had the power to forbid the transportation of persons for such purposes the same as it had prohibited the transportation of lottery tickets and that such an exertion of power by Congress “does not encroach upon the jurisdiction of the States.”⁴⁷ As for the contention that a person has a right to go from one state into another, the court said, “It urges a right exercised in morality to sustain a right to be exercised in immorality.”⁴⁸ The constitutionality of these sections dealing with interstate transportation of women for immoral purposes has subsequently been affirmed in a number of decisions involving a variety of questions.⁴⁹ It has been held that the transportation need not be by common carrier;⁵⁰ that the transportation need not be for pecuniary gain;⁵¹ that the prohibition is applicable to the transportation of a woman to manage a resort;⁵² and that intent is all that is necessary, even if a journey is not consummated by immoral practices.⁵³

A survey of the acts by which Congress has sought to regulate this traffic indicates that the purpose of this legislation has been to suppress an avowed evil rather than a regulation of commerce. Regulation of commerce has been a means to an end. Speaking in favor of the White Slave Traffic Act while the measure was pending

⁴⁶ *Hoke and Economides v. United States*, 1913. 227 U. S. 308 at 320.

⁴⁷ *Ibid.*, at 321.

⁴⁸ *Ibid.*, at 321.

⁴⁹ *Athanasaw v. United States*, 1913. 227 U. S. 326; *Bennett v. United States*, 1913. 227 U. S. 340; *Wilson v. United States*, 1914. 232 U. S. 563; *Caminetti v. United States*, 1917. 242 U. S. 470.

⁵⁰ *Wilson v. United States*, 1914. 232 U. S. 563.

⁵¹ *Caminetti v. United States*, 1917. 242 U. S. 470.

⁵² *Simpson v. United States*, 1917. 245 Fed. 278.

⁵³ *United States v. Brand*, 1916. 229 Fed. 847

in Congress, Congressman Russel said, "It is designed to destroy the revolting situation which has grown up in the last few years through the importation and interstate transportation of women and girls for immoral purposes."⁵⁴ This illustrates the attitude taken by the members favoring the measure. Those who did not favor the bill opposed it on the ground of constitutionality declaring it was not a valid exercise of the power to regulate commerce.

With the exception of the Keller case the courts have held that these regulations are not in conflict with the jurisdiction of the states. The states still regulate immoral practices within their borders. The only case where the federal government actually reaches over into the province of the states is where it compels the registration of alien women and deports them if they engage in illicit callings. How effective these acts have been in suppressing vice would be difficult to say. The White Slave Traffic Act is aimed mainly at persons assisting women to travel in interstate commerce for immoral purposes. It does not prevent a prostitute from traveling freely from one state into another to pursue her illicit calling; nor does it prevent a man from going from one state into another to engage in immoral practices. Its purpose and effect is to suppress an organized, commercialized traffic in vice. Like gambling, commercialized vice has been universally disapproved by the states and in legislating on the subject Congress has coöperated rather than conflicted with the regulations of the states.

⁵⁴ *Cong. Rec.* vol. 45, pt. 1, p. 821.

CHAPTER VIII

PROMOTION OF PUBLIC HEALTH

THE question of public health has probably always been one of governmental concern. Even in primitive society, where health measures took the form of incantations, they were closely associated with the government and the individual was compelled to submit to what was considered the welfare of the group. Submission to public health regulations is a price the individual has to pay for living in an organized society. With the development of science, and because of concentration of population in urban centers, health regulations have become more extensive. Governments have sought, both directly and indirectly, to promote public health. They have attempted to promote public health by direct action in the establishment of public hospitals and free clinics, and in mother's welfare legislation. Indirectly governments have sought to insure public health by subjecting to public regulations such private enterprises as the manufacture and distribution of food.

In our constitutional system the regulation of public health and public welfare is left to the states. State and local agencies have been free to formulate public health policies. The federal government, until recently, confined its health measures to the territories and to such distinctly national questions as port quarantine regulations. Recently, however, the federal government has assumed a more aggressive attitude. By means of grants

it seeks to coöperate with the states in such programs as the extermination of social diseases¹ and the promotion of maternity and infant hygiene.² Through its power to regulate interstate commerce it has enacted a comprehensive system of food and drug legislation. In the guise of regulating commerce and levying taxes it has attempted to regulate child labor. The question of federal regulation by means of grants is considered in another connection.³ The food and drug regulations and the attempted regulation of child labor are important in their bearing upon the relationship of the federal government and the states and warrant special consideration here.

Food and Drugs. That an individual cannot conduct his business to the detriment of the public is an old legal principle. On this principle the practice of confiscating food offered for sale when such food is unfit for human consumption is justified in all the states. On this same principle Congress has made a number of regulations regarding the subjects of food and drugs. These regulations are in the nature of police regulations, the object aimed at being the preservation of public health and the prevention of fraud. It is in the guise of regulating foreign and interstate commerce that Congress has legislated on these subjects. It is not necessary to consider the content of the many laws enacted by Congress that deal with food and drugs. But it is pertinent to observe the methods employed in dealing with these subjects; the purpose of the legislation; and how, in regulating traffic in these articles, Congress has exercised powers similar to those exercised by the states.

¹ Act of July 9, 1918, 40 Stat. at L. 887.

² 42 Stat. at L. 224. See *infra* chap. IX.

³ Chaps. V, IX.

Congress has used two methods in regulating interstate commerce in foods. In the first place, it has made certain articles subject to state laws as soon as their destination is reached even though they are still in the original packages. This has been done in the case of imitation dairy products,⁴ and in the case of carcasses of game animals or birds.⁵ Like the Wilson Act, this legislation was intended to give the states a free hand in the enforcement of local laws. What necessitated the Wilson Act was the decision that intoxicating liquor was an article of commerce and not subject to state regulations while still in the original package.⁶ Likewise the courts have decided that oleomargarine is an article of commerce and for this reason the states could not prohibit it from being brought in.⁷ The legislation dealing with game animals and birds was to assist the states in enforcing their game laws. This method has not been extensively employed. It merely withdraws the immunities of interstate commerce from certain articles in order to give the local authorities the power to enforce local laws.

The second method employed in regulating commerce in food has been to exclude from interstate commerce articles which do not come up to the standards fixed by Congress. This has been the method adopted by Congress in enacting legislation to insure the purity of food and drugs. An act of 1884 prohibits the transportation of diseased live stock in interstate commerce.⁸ The Meat Inspection Acts of 1891 and 1907 prohibit the

⁴ 32 Stat. at L. 194. 1902.

⁵ 31 Stat. at L. 188. 1900.

⁶ *Leisy v. Hardin*, 1890. 135 U. S. 100.

⁷ *Schollenberger v. Pennsylvania*, 1898. 171 U. S. 1.

⁸ 23 Stat. at L. 32.

interstate transportation, by packers, of meats which have been pronounced unfit by the federal authorities.⁹ An act of 1902 forbids false labeling of the place of origin of dairy and food products.¹⁰ These measures illustrate the method that has been pursued by Congress. A standard of purity is fixed and federal authorities determine whether an article measures up to that standard. If it does not meet the requirements it is denied the facilities of interstate commerce.

Congressional legislation pertaining to pure food and drugs dates back to as early as 1848 when a law was enacted prohibiting the importation of spurious and adulterated drugs.¹¹ But general food and drug legislation is of recent origin. The Pure Food and Drug Act of June 30, 1906¹² is the most sweeping measure of this kind. The purpose of this act is illustrated by the title. It is "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein. . . ." Congress having no power to regulate manufacturing in the states, the provisions dealing with this phase were made to apply only in the territories and the District of Columbia.¹³ By the provisions of the act, drugs are to be considered misbranded and adulterated if they are below a certain purity and strength, if they contain injurious ingredients which are not mentioned on the label, or if they are

⁹ For these acts, see 26 Stat. at L. 1090, 1091; and 34 Stat. at L. 1260.

¹⁰ 32 Stat. at L. 632.

¹¹ Act of June 6, 1848, 9 Stat. at L. 237.

¹² 34 Stat. at L. 768.

¹³ For the holding that manufacturing is not commerce, see *Kidd v. Pearson*, 1888. 128 U. S. 1; *United States v. E. O. Knight Co.*, 1895, 156 U. S. 1.

stained or colored so as to conceal inferiority.¹⁴ Foods are to be considered misbranded and adulterated if the trade name suggests a different product, or if the article contains harmful ingredients which are not mentioned on the label. Extensive provisions were made for the enforcement of the act. A commission, composed of the Secretaries of the Treasury, Agriculture, and Commerce and Labor, was created to formulate rules and regulations for its enforcement. The Bureau of Chemistry in the Department of Agriculture was authorized to examine foods and drugs. The District Attorneys were obliged to commence proceedings upon complaint of the Secretary of Agriculture, and could institute proceedings either *in personam* or *in rem*.¹⁵

The courts have been liberal in their interpretation of the powers of Congress under the commerce clause when the subjects of regulations have been food and drugs. Adulterated products have been considered injurious *per se*, the same as putrid meat or decayed fruit, and unquestionably can be excluded from interstate commerce. In the case of *McDermott v. Wisconsin* the court said that Congress "has full power to keep the

¹⁴ In the case of *United States v. Johnson*, 1911, 221 U. S. 488 it was held that a misstatement regarding the curative effects of a patent medicine was not a misstatement of facts according to the meaning of the Food and Drug Act which applied only to misstatements regarding ingredients. In order to remedy this defect the "Sherley Amendment" was added August 23, 1911, 37 Stat. at L. 416, which provides that a drug or medicine is misbranded "If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

¹⁵ The Food and Drug Act did not prevent false statements of quantities contained in packages. The Net-Weight Act was added on March 3, 1913. This provides that all packages shipped in interstate commerce shall be plainly marked to show the quantity of the contents. For this provision, see 37 Stat. at L. 732.

channels of . . . commerce free from the transportation of illicit and harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof.”¹⁶

Obviously the object of food and drug acts is to protect the ultimate consumer from inferior and harmful products. The regulation of interstate commerce is merely a means to this end. Such acts are not like the act regulating the transportation in interstate commerce of explosives,¹⁷ in which case regulations are necessary to protect interstate commerce itself. The fact that a food product has a false label certainly does not make that product dangerous to handle nor will it impede the progress of interstate commerce. The courts have recognized that the purpose of food and drug legislation is to protect the consumer. In *McDermott v. Wisconsin* the Court said, “The object of the statute is to prevent the misuse of the facilities of interstate commerce in carrying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits the brands regulated must be upon the packages intended to reach the purchaser.”¹⁸ This principle of protecting the consumer from inferior products or fraud necessarily brings the federal government into a field also occupied by the states, since suppression of fraudulent practices and making sanitary regulations are functions exercised by the states. There is thus a dual regulation, both the federal and state governments fixing standards. This does not necessarily bring about

¹⁶ 228 U. S. 115, at 128. 1913.

¹⁷ For this act, see 35 Stat. at L. 554. 1908.

¹⁸ 228 U. S. 115, at 131.

a conflict between the two governing authorities, but it makes the producer of products intended for interstate commerce responsible to both the federal and state governments. The states, however, cannot interfere with the regulations provided by the federal government. A state statute providing that cans of syrup containing a certain per cent of glucose should be labeled according to specifications laid down in the statute and should not have any other label was declared unconstitutional in *McDermott v. Wisconsin* as an interference with the regulation of interstate commerce. The court in this case held that, since the purpose of the Food and Drug Act was to protect the consumer, the label prescribed by the federal authorities must be on the article purchased by the consumer. It was held that the jurisdiction of the federal government over the article did not cease when the original package was broken. Such an interpretation, the court stated, would defeat the purpose of the act which was a valid exercise of the power to regulate interstate commerce and would thus limit Congress in effectively exercising a constitutional power. The federal government, then, continues to exercise a certain amount of power over the articles after they have been removed from the original package and placed upon the shelves of a store where they are offered for sale, even though they have then become a part of the general property in the state over which the state has jurisdiction for police and taxing purposes. They must bear the label prescribed by the federal government.¹⁹ This regulation of the federal government, however, does not preclude the

¹⁹ While this is a new extension of power under the commerce clause a similar situation occurs where the producer is protected in his patent rights by the federal government.

states from making additional regulations regarding the labeling of products offered for sale within their borders. An Indiana statute prescribing that the ingredients of patent stock food offered for sale in the state should be labeled on the package and that the state should charge a fee for inspecting such products was held not to be repugnant to the Food and Drug Act.²⁰ Since the federal law did not require a statement of the ingredients the state could make such a requirement without conflict. Likewise a statute of North Dakota requiring lard, when not sold in bulk, to be put up in containers holding a specific number of pounds net weight and labeled as specified by the statute was held not to be in conflict with the federal law.²¹

In order to protect the consumer the federal government requires that certain standards of sanitation shall be maintained in plants producing articles of food intended for interstate commerce. By the Meat Inspection Act of 1907, the Secretary of Agriculture is authorized not only to inspect the products intended for interstate commerce, but to make a sanitation inspection of the plant. The state in which the plant is located can make additional regulations, but the producer must conform with the federal regulation if he is to enjoy the facilities of interstate commerce. In enforcing the Food and Drug Act the Federal authorities can seek a remedy *in rem* and proceed to confiscate adulterated products while in transit or at the termination of an interstate shipment if still in the original package.²² That the states may

²⁰ *Savage v. Jones*, 1912. 225 U. S. 501.

²¹ *Armour v. North Dakota*, 1916. 240 U. S. 510.

²² *Hipolite Egg Co. v. United States*, 1911. 220 U. S. 45.

exercise a similar power if the product endangers public health is established by a long line of decisions.

In their interpretation of legislation dealing with food and drugs the courts have been inclined to take a liberal attitude. On the whole, the opinions have been consistent. The decisions have been based upon the argument that Congress is vested with the power to regulate interstate commerce and that this power includes the power to deny the facilities of interstate commerce to articles which are harmful and by which fraud might be perpetrated upon the purchaser.

Child Labor. While the acts purporting to abolish child labor by excluding from interstate commerce the products of factories or mines employing children and levying punitive taxes upon the employers of children in certain industries have been declared unconstitutional, the questions involved in connection with this legislation are so pertinent that they require at least a brief consideration.

The problem of child labor is an outgrowth of modern industrialism. In the factory system children can be profitably employed, but in the employment they are apt to be deprived of an opportunity to develop their full physical and mental capacities. When such a condition results the gain to the employer becomes a loss to society at large. For this reason, on the grounds of public policy, all the more advanced countries have adopted regulations to govern this kind of employment. Such legislation is essentially in the nature of police regulation to promote public health, morals, and general welfare. All of the states in the Union have adopted regulations of this kind. But there is no uniformity of standards prevailing in the different states, and in some the stand-

ards have been regarded as being too low. The federal child labor laws sought to adopt a uniform standard and impose that standard upon the states that are backward in this respect.

It is not necessary here to review in detail the history of child labor legislation in Congress. Senator Beveridge urged the adoption of a child labor law in the Senate as early as 1906. From then on proposals for legislation on the subject were made in Congress at various times until the Child Labor Law was approved September 1, 1916. The first section of this act provides:

That no producer, manufacturer, or dealer shall ship in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock *post-meridian*, or before the hour of six o'clock *ante-meridian*.²³

It will be observed that this act, like the acts pertaining to lotteries and vice, was an attempt to accomplish by an indirect method what Congress was not expressly empowered to do. It was repeatedly asserted in both houses of Congress, in the course of the debates on the bill, that the purpose of the measure was to

²³ 39 Stat. at L. 675.

"stamp out child labor." ²⁴ However, in some important respects this legislation marks a new departure in the federal exercise of police power from that attempted in the legislation purporting to discourage lotteries and vice. Such legislation as the Lottery Act, the White Slave Traffic Act, and the Webb-Kenyon Act would tend to assist the individual states in regulating certain evils, and would protect the people of the states into which these articles of commerce would be sent from the dangers of unthrift and dissipation. Such laws as those excluding diseased live stock and the Pure Food and Drug Act were intended to protect the consumer against inferior and fraudulent products shipped in interstate commerce. The Child Labor Law did none of these things. The products of child labor certainly were not noxious *per se*, nor were they fraudulently labeled. Consequently this law did not protect the consumer. Unlike the other regulations, the Child Labor Law reached back to the place of creation of the subject of interstate commerce and sought to regulate the conditions of labor under which the article was produced. It sought to prohibit the exploitation of children rather than to prevent the shipment in interstate commerce of goods by which fraud might be perpetrated upon the consumer or by which he might be injured. In the guise of regulating interstate commerce Congress was entering the field of factory legislation. By the terms of the act the Attorney General, the Secretary of Commerce, and the Secretary of Labor constituted a board to make and publish uniform rules for the execution of the provisions of the measure. The Secretary of Labor, or a representative

²⁴ See Senator Kenyon's remarks in support of the bill, *Cong. Rec.* vol. 53, pt. 3, pp. 3021-3045.

of his, was authorized to enter and inspect any factory at any time. The District Attorney was obliged to prosecute upon the complaint of either the federal or state authorities.²⁵

May Congress exercise its power to regulate interstate commerce for what it conceives to be the good of the country at large, even to the extent of prohibiting harmless and useful articles of commerce produced under conditions of labor which it deems detrimental? This was the question before the Supreme Court when testing the constitutionality of the first Child Labor Law. The decision of the court is significant in that it tends to establish a line of demarcation, indefinite though it be, between what constitutes a valid exercise of congressional power under the commerce clause and covert legislation designed to accomplish by indirection what could not constitutionally be accomplished by direct legislation. The act was held to be unconstitutional in the case of *Hammer v. Dagenhart*.²⁶ In delivering the opinion of the court, Justice Day said, "The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effects does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. . . . Over interstate transportation, or its incidents, the regulating power of Congress is ample, but the production of articles, intended for in-

²⁵ For these provisions, see secs. 2, 3, and 4 of the act, 39 Stat. at L. 675.

²⁶ 247 U. S. 251. 1918.

terstate commerce, is a matter of local regulation.”²⁷ As for the argument that different standards among the states would give the industries in the states with lax child labor laws an unfair advantage, the court pointed out that local labor legislation on various subjects might give one state an advantage over the others. But “There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition.”²⁸ In conclusion the court declared that the act in a twofold sense is repugnant to the Constitution. “It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.”²⁹

This opinion clearly indicates the far-reaching effects of a federal statute like the Child Labor Law. It is therefore important to observe that this was a divided opinion, four judges dissenting.³⁰ Justice Holmes wrote the dissenting opinion and took the extreme view that the power to regulate commerce was given to Congress in unqualified terms; that the exercise of that power is limited only by such provisions in the Constitution as

²⁷ *Hammer v. Dagenhart*, 1918. 247 U. S. 251, at 271.

²⁸ *Ibid.*, at 273.

²⁹ *Ibid.*, at 276.

³⁰ J. J. McKenna, Brandeis, and Clarke concurred in the dissenting opinion.

the Fifth Amendment; and that the exercise of the power could not be qualified by the fact that it might interfere with the domestic policies of the states.

To carry the view expressed in the dissenting opinion to its logical conclusion would mean practically a nullification of the Tenth Amendment and an admission that the division of powers between the central government and the states is nothing more than a governmental fiction. If Congress, through its powers to regulate interstate commerce, can determine what conditions must prevail in a factory with respect to the age of the employees there is no reason why it could not do the same thing with respect to sex, color, wages, and hours of work. Nor would it need to confine itself to labor legislation. It could set up standards with respect to compulsory school attendance, public health, divorce, conveyancing of property — in fact, everything now regulated by the states could be made subject to federal regulation — and the federal government could enforce such standards under penalty of depriving a person of the privilege of sending his products in interstate commerce. The commerce clause must be considered as a part of, not as apart from, the Constitution, the context of which presupposes the existence of a sphere reserved exclusively to the states. It was inserted in the Constitution primarily to insure freedom of interstate transit against annoying state regulations. Certainly it was not contemplated that this was a clause to invoke if Congress desired to legislate on matters which, by the Constitution, were left exclusively with the states.

Failing in its attempt to regulate child labor through the commerce clause, Congress sought to accomplish the

same end by invoking the taxing power.³¹ A law was enacted containing essentially the same provisions as the original child labor law, but, instead of forbidding the transit in interstate commerce of articles made by child labor, it imposed a tax upon the employer. This law was declared unconstitutional in a recent decision,³² the court holding that the imposition was not a tax but a penalty exacted from an individual for departing from a specified course of conduct in business prescribed by Congress, and that Congress had no power to prescribe such a course.³³ As in the case of *Hammer v. Dagenhart*, the court saw the danger threatening our constitutional system if Congress, in the guise of exercising a constitutional power, could regulate all matters over which the states have jurisdiction. The reasoning in the opinion is similar to that in the first child labor decision and it is interesting to note that, whereas four judges dissented in *Hammer v. Dagenhart*, only one judge, Justice Clarke, dissented in *Bailey v. Drexel*.

The child labor decisions are tremendously important in that they reaffirm that ours is a federal system of government; that the states have certain powers which can not be usurped; and that there are limits to congressional actions outside of the express limitations contained in the Constitution itself. These decisions appear all the more courageous when it is considered that they set aside measures which were popularly approved. Child labor legislation is laudable and federal legislation on the subject may be desirable, but to permit such methods as have been resorted to would be to sanction a usurpation

³¹ Act of February 24, 1919, 40 Stat. at L. 1057, 1138, chap. 18.

³² *Bailey v. Drexel Furniture Company*, 1922, 66 L. Ed. 522.

³³ For a further consideration of this decision, see *supra*. chap IV.

of the powers of the states whenever Congress deemed it advisable to encroach upon the jurisdiction of the states. Such an interpretation of the Constitution, in the long run, would probably be regretted. It is difficult to see how Congress can constitutionally attack the problem. Suggestions have been made to prohibit child labor by a constitutional amendment. The feasibility of such a step is questionable. There is the danger of padding the Constitution with statutory material, and the Eighteenth Amendment is proving that the addition of amendments which have a bearing on human conduct has its disadvantages as well as its advantages. Federal regulations might be effected through the system of advancing funds to the states for educational purposes by withholding funds from those states which were lax in their child labor laws. The difficulty in this, however, is obvious. The states which are backward with respect to child labor are the very ones which have a poor educational system and which might need federal aid and encouragement. If they should retain a lax system of child labor legislation and thus forego the advantages of federal aid they would be laboring under a double handicap.

It is lamentable that such conditions obtain in some of the states as to make federal regulation of child labor appear necessary. It is questionable if federal regulation is the proper remedy. Such conditions obtain in a community because local public opinion has not been awakened to a realization of the dangers of children being handicapped physically and mentally by premature employment. Federal agencies, such as the Children's Bureau, can do much to arouse public sentiment. Those states which have adopted constructive policies with re-

spect to the employment of children have been successful to the extent that local public opinion has favored the regulations. Social workers admit that local child labor laws are difficult to enforce. Many parents, either because of short sightedness or indigence, desire the earnings of their offspring and seek to evade the law by making false statements with regard to the ages of the children. Many boys desirous of escaping from the monotony of the school room are ready and eager to perjure themselves in order to be permitted to seek employment. It is questionable if federal regulation would be a satisfactory method of coping with the problem. The better solution seems to be for the states to assume the responsibility for such regulations along with their labor legislation and truancy laws. Whether or not the more backward states will do this depends upon the creation of a favorable public opinion in those states. Federal agencies can help in the molding of a public opinion. If the same ends can be accomplished by state control as by federal control obviously it is better to leave the states in control.

CHAPTER IX

PROMOTION OF EDUCATION

IF the government created by the Constitution is to be considered as possessing only delegated powers, then it must be admitted that the control of public instruction, except in territory exclusively under the jurisdiction of the United States, belongs solely to the states. Constitutional provisions, such as the commerce clause, the postal clause, and the taxing clause, have been invoked to legalize centralization in the regulation of matters pertaining to police. No provisions of the Constitution can be called forth to legalize federal control of education. The Constitution is silent on the subject. Those who seek a constitutional justification for federal control are forced to base their contentions on such vague generalities as the power of Congress to promote the general welfare¹ or to dispose of property belonging to the United States.² To construe these general provisions as clothing the federal government with additional powers, not otherwise conferred, is to endanger the doctrines of limited powers as well as that of the division of powers between the central government and the states — both of which are cardinal principles in our constitutional system.

¹ Promotion of the general welfare is mentioned in the Preamble, and in Art. I, sec. 8: 1. Congress is given power to tax in order to provide for the general welfare.

² Art. IV, sec. 3: 2.

When the Federal Convention assembled in 1787 public instruction was in its early experimental stage. Beginning with the instructions to Governor Yardly of Virginia in 1618, public grants of land and money for educational purposes were not infrequently made. A large portion of these donations was used for higher institutions of learning, for the spread of religious teaching among the Indians, and for the indigent and orphans. Free and compulsory education had not been universally established when the Constitution was drafted. Education was viewed as of private, local, or state concern, and, while the members of the Federal Convention were educated men who were disposed to view favorably any efforts to enhance educational facilities and opportunities, they apparently were not willing to expressly clothe the central government with powers to create and maintain educational institutions. Proposals in the interests of education were brought before the Convention by Madison and would have given Congress power: "To establish seminaries for the promotion of the arts and sciences. To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trade and manufacture."³ These proposals were not accepted by the Convention. In its final form, there is only one provision of the Constitution which bears evidence that the framers intended that the national government should concern itself with the advancement of learning. This provision empowers Congress: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."⁴

³ See *Journal* for August 18, 1787.

⁴ Art. I, sec. 8: 8.

While the Constitution does not expressly make provisions for education, the federal government has always assumed a friendly attitude. As early as 1785 grants of public lands were made for educational purposes by the Congress under the Articles of Confederation. The Ordinance of 1787 for the government of the Northwest Territory contained the declaration, "Religion, morality and knowledge being necessary to good Government and the happiness of mankind, schools and the means of education shall forever be encouraged." Washington, who had presided over the Constitutional Convention and who therefore was in a position to know the attitude of the delegates, cherished the idea of a national university and was of the opinion that federal legislation in aid of education was not inimical to the principles of the constitution which he had helped to draft. In his farewell address he declared, "Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened."⁵ Apparently it was Washington's desire that education ought to be made a unifying influence, that it should help to develop a national consciousness and thus break down provincial prejudices. This is indicated by the following significant words from his last will and testament: "It has been my ardent wish to see a plan devised on a liberal scale which would have a tendency to spread systematic ideas through all parts of this rising Empire, thereby to do away with local attachments and state prejudices as far as the nature of things would, or indeed ought to

⁵ *Writings of George Washington*, ed. by Worthington C. Ford (14 vols., New York, 1893), XIII, 309.

admit, from our national councils.”⁶ This attitude of Washington and other early leaders has been reflected in those who have subsequently shaped the policies of the national government. The financial aid given to education has been generous and well invested, and in recent years Congress, not satisfied by merely rendering financial assistance, has attached such provisos to its grants as will give the federal government a decided influence in shaping educational policies in the states.

It is interesting to observe the direction taken by congressional legislation dealing with education. Owing to the absence of a constitutional basis for such legislation, the regulations have not been coercive; there has been little or no interference with personal or property rights; the federal government has merely offered facilities under its control, sometimes with and sometimes without any conditions attached, and the states or private individuals, as the case may be, could take advantage of the opportunity offered by the central government or disregard it according to their own pleasure. As a result the constitutionality of federal legislation for the promotion of education has never been seriously questioned. Generally speaking, it may be said that legislation of this kind has taken two forms. In the first place, there have been created federal agencies for the collection and dissemination of useful information to persons desiring it. In the second place, educational systems and institutions have been advanced by congressional grants.

Commissions, bureaus, and even executive departments have been created for the purpose of collecting and distributing information to those who desire it. The primary function of the Department of Agriculture

⁶ *Writings*, XIV, 277.

is to conduct investigations, collect information, and make its findings available to the public. The same, to a lesser degree, may be said of some of the other departments. Whether or not these functions are authorized by the Constitution has been considered in an academic way, but the constitutionality of these executive departments has never been questioned in the courts. Obviously, federal administrative agencies execute the enactments of Congress and can exercise a control over only such matters as Congress is authorized to regulate. Congress is authorized to regulate the postal system. The result is that the Postmaster General has been given control over the postal system, with power to issue administrative orders affecting private rights. But Congress is not given power to control labor or agriculture, except in so far as such control might be necessary to carry out some of its other powers. Consequently, the Secretaries of Agriculture and Labor do not have control over agriculture or labor, but are charged with the duty of promoting the interests of agriculture and labor. One way of performing this duty is by making a study of the problems involved in these fields of interest and placing the results of such a study where it will prove useful. There is nothing compulsory in this. The government is merely offering expert service to those who desire it.

A glance at a list of the subdivisions of some of the executive departments will suggest the amount of work done by the federal government in the various fields of investigation and in gathering and distributing information. In the Department of Agriculture there is the Forest Service, the Weather Bureau, the Bureaus of Animal Industry, Plant Industry, Chemistry, Soils, Entomology, Biological Survey, Crop Estimates, Markets,

Public Roads, the Horticultural Board, Insecticide Board, and the Division of Home Economics. All of these agencies are investigating, collaborating, and giving the public the benefits of their discoveries. In the Treasury Department there is the health service; in the Interior Department are found the Bureau of Education and the Bureau of Mines; in the Department of Commerce, the Bureaus of the Census, Foreign and Domestic Commerce, Fisheries, Standards, and Navigation; in the Department of Labor, the Bureaus of Labor Statistics, Children's Bureau, Women's Bureau, Employment Agency, and provisions for labor conferences. This is by no means a complete list of federal agencies engaged in investigation, but it illustrates how the federal government is contributing to the various fields of knowledge.

These subdivisions of the executive departments which have been mentioned comprise only a part of the complicated federal administrative system. They are cited to show the number and variety of administrative agencies created by Congress for the primary purpose of gathering and disseminating information. The work of these agencies is, strictly speaking, not of a governmental nature. Certainly, it is not of the same character as the exercise of the war power, treaty power, or taxing power, upon which the life of the government might depend. Agencies for gathering useful information along agricultural, commercial, or industrial lines are intended to benefit certain classes and individuals, and thus only indirectly to advance the interests of the body politic.

The Bureau of Education, with a Commissioner of Education at its head, is a federal agency, the organization and function of which is not unlike the other

agencies we have mentioned. Like these other agencies it has its field for investigation, namely, the field of education in its more restricted and technical sense. Like these agencies, also, it is not vested with powers to control education in the states or to coerce state and local officials. Its duties are primarily to investigate and to compile and distribute information. It cannot force the states or localities; it can only inform, suggest and recommend. In brief, it serves as a national clearing house of information pertaining to education.⁷

We come now to a consideration of the second way in which the federal government has participated in promoting education, namely, by means of grants in land and money. From the viewpoint of the degree of control over local educational policies which the national government has assumed in making grants for the promotion of education, the history of federal aid may be divided into two periods. The first period antedates the Constitution and extends down to 1914. During this time the policy of the federal government with respect to education was consistent. Education was looked upon as a function of the several states, and in no sense a function of the national government. The second period may be said to begin with the passage of the Smith-Lever Act in 1914, which marked a distinct departure from the traditional policy of the national government towards education.⁸

During the first century of the federal government

⁷ In our territorial possessions, among the Indians, and wherever the jurisdiction of the federal government is exclusive, Congress can, of course, determine and enforce educational policies the same as other policies.

⁸ For an excellent recent summary of federal grants legislation for the promotion of education, see Austin F. Macdonald, *Federal Subsidies to the States*, Philadelphia, 1923, chaps. I-III.

the national grants made for the advancement of education were land grants. Senator Sterling notes that, "From the year 1803 to the year 1846, inclusive, twelve states had received the sixteenth section as an endowment for public schools, either out of the land ceded by the states to the United States, or out of the Louisiana Purchase, the total being 10,919,586 acres," and "From the year 1850 to the year 1875, inclusive, fifteen states received sections sixteen and thirty-six out of every township belonging to the public domain, for common school purposes, or a total of 52,869,872 acres."⁹

The most important of these grants, with respect to having an influence on education in general, were unquestionably the Morrill Act of 1862 which made grants of land for the establishment of colleges of agriculture and mechanic arts, and the subsequent supplementary legislation to carry out the purposes of this act. The purpose of the Morrill Act was not to aid the common schools or education in general, but to establish a new type of educational institution. This is shown by the language of the act, "The leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the Legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."¹⁰

The Morrill Act was approved by President Lincoln

⁹ Thomas Sterling, "Constitutional and Political Significance of Federal Legislation on Education" in Proceedings of a Conference on the Relation of the Federal Government to Education, *University of Illinois Bulletin*, vol. XIX, No. 17, Dec. 26, 1921, p. 92.

¹⁰ 12 Stat. at L. 503, at 504.

after it had been vetoed by President Buchanan. In vetoing the measure in 1859, President Buchanan expressed doubts as to whether the bill would contribute to the advancement of those ends which its sponsors hoped it would accomplish, since, as he maintained, "The Federal Government, which makes the donation, has confessedly no constitutional power to follow it into the States and enforce the application of the fund to the intended objects. . . . The Federal Government has no power, and ought to have no power to compel the execution of the trust."¹¹ It is interesting to observe that, while there are good legal reasons for President Buchanan's contentions, the constitutionality of the Morrill Act has never been questioned in the courts. This is probably because the federal government has not sought by litigation "to compel the execution of the trust," but has, in a spirit of friendly coöperation, sought to persuade the states to accept the benefits of the federal legislation and apply the funds to the purposes expressed in the act.

The influence of the Morrill Act has been immeasurable. Dean Davenport has observed that at the time of the enactment of this legislation the Sheffield School of Applied Chemistry, established in 1847, and the Michigan Agricultural College, founded in 1857, were the only institutions of learning in the United States which even remotely touched agriculture, and that the great subject of mechanical arts, out of which has developed the various fields of engineering, was not represented in any institution of collegiate grade.¹² Higher education was

¹¹ James D. Richardson, (ed.), *Messages and Papers of the Presidents*, V, 546.

¹² Eugene Davenport, "Early Effects of Congressional Appropriations for Education," in *University of Illinois Bulletin*, vol. XIX, No. 17, Dec. 26, 1921, p. 8.

considered the property of the chosen few; there was developing a sort of caste system based on learning; teachers had exalted culture as the great object of education. The Morrill Act sought to establish schools of collegiate grade for the instruction of artisans and farmers. The establishment of such schools has had an inestimable influence in making education more democratic, and in changing the end of higher education from that of culture to that of public service.

During the first twenty-five years of their existence, as was to be expected, the land grant colleges encountered serious difficulties. They were breaking new ground; qualified teachers were not available; and methods of instruction were in the experimental stage. Progressive teachers finally arrived at the conclusion that if a science of agriculture was to be developed, if underlying principles were to be discovered so that students could become acquainted with them, the inductive method must be introduced. Only by experimentation could facts be obtained out of which anything like a science could be built up. These teachers contended that principles rather than practices should be taught, and that it was impossible to do this unless laboratories were provided for working out these principles. Congress responded to the demand and in 1887 passed what has been known as the Hatch Act, establishing an experiment station in every agriculture college denominated.¹³

The effect of the Hatch Act was far-reaching. Professor Davenport has described it as "the first official act of any legislative body on record to recognize the fundamental need of research and to provide the means

¹³ Act of March 2, 1887, 21 Stat. at L. 440.

for insuring its realization.”¹⁴ On the results of this new policy in agricultural education, made possible by the experiment stations, Professor Davenport comments as follows:

The result was first of all, that whereas for twenty-five years the colleges of agriculture had labored industriously but unsuccessfully, had been ignored by the farmers and ridiculed by the educators, they now found themselves in possession of the most powerful weapon ever known to the teacher; that is to say, a collection of newly discovered facts for the most part fairly well established even if few and far between.

The first effect of this was to attract the favorable attention of farmers. The second effect was to fill up the agricultural courses with students. The third effect was to impress serious minded educators, particularly those in scientific lines. The next effect was to modify and ameliorate the attitude of mind even of the narrowest classicist, and the old and the new began for the first time to come together and talk the matter over.

Finally, with the coming of research into the field of agriculture, and later to some extent into the field of engineering, these two subjects became attractive to the universities of the country. Then it was that we as a people entered for the first time in our educational history upon what might be called rational policies to be evolved by the needs of a people, as they must be evolved in a democracy if it is to live and maintain a free government.¹⁵

The Morrill Act, aside from requiring the teaching of military tactics in the land grant colleges, practically left the control of these institutions with the states. Likewise in the Hatch Act, while the enactment was

¹⁴ *University of Illinois Bulletin*, vol. XIX, No. 17, p. 15.

¹⁵ *Ibid.*, p. 16.

specific as to purpose and clothed the Federal Department of Agriculture with advisory powers and called upon it to promote the purpose of the legislation, it left the carrying out of its provisions entirely to the states. President Buchanan, in vetoing the first Morrill Act feared that it would be unwise for the federal government to turn funds over to the states without retaining control so as to enforce the application of the funds to the intended objects. These fears were not entirely unfounded. Subsequent legislation has indicated that federal surveillance is not unnecessary. In 1890 the second Morrill Act was passed.¹⁶ Mr. Allen, Chief of the Office of Experiment Stations in the Department of Agriculture, notes that the second Morrill Act "for the first time contained provision for Governmental administration."¹⁷ The degree of control vested in the federal government by this act, however, was exceedingly slight. Congress expressed a desire for a closer supervision of the funds arising under the act, charged the Secretary of the Interior with the administration of the law, and provided that payment of the allotments should be on his warrant. In 1894 the Secretary of Agriculture was given similar authority with respect to the experiment station fund provided for in the Hatch Act.¹⁸ Prior to the more recent legislation the federal government, aside from thus exercising a rather lax supervision of the funds, did not attempt to interfere with the states in their execution of the provisions of the federal grants.

But the granting of funds and the supervision of ex-

¹⁶ Act of Aug. 30, 1890, 26 Stat. at L. 417.

¹⁷ E. W. Allen, "Problems of Administering Federal Appropriations to State Institutions," in *University of Illinois Bulletin*, vol. XIX, No. 17, Dec. 26, 1921, p. 47.

¹⁸ Act of Aug. 8, 1894, 25 Stat. at L. 264, at 271.

penditures were merely subsidiary to the principal purpose of federal grant legislation. Such grants were the means to an end. Congress was formulating an educational policy which it sought to have carried out on a national scale. The attitude which the federal government was assuming is admirably stated by Mr. Allen:

It is important, therefore, to recognize that the Government's interest in these matters has gone beyond that of a donor of funds. The Federal grants are not regarded in the nature of gifts or endowments in the ordinary sense of private benefactions. There is little evidence, certainly of late, that Congress has thought of the appropriations it made in the light of subsidies.

Having established these features in the State colleges, it has become a partner in them, not alone in their support but to a certain extent in the working out of the fundamental idea. More and more Congress has come to view these institutions as in partnership with the Government. Furthermore, it has attempted to develop a national system, and hence has had certain general policies it desired to see carried out. Later legislation especially has committed it to the policy of promoting the general good of these various branches of effort. The primary object, then, has been to aid the States in developing this novel educational system on a national basis.¹⁹

This growing tendency on the part of Congress to consider education as a national problem, and the desire to formulate a national educational policy inspired the more recent legislation which vests a greater degree of control in the federal government. Beginning with the Smith-Lever Act of 1914,²⁰ there appears a distinct change of policy in congressional legislation dealing with educa-

¹⁹ *University of Illinois Bulletin*, XIX, No. 17, p. 50.

²⁰ Act of June 8, 1914, 38 Stat. at L. 767.

tion. Under former grants the states had incurred practically no obligations in accepting the federal aid. Conditions were now stipulated which the states must meet before they can receive the funds from the federal government. Roughly speaking, two conditions are attached. In the first place, before a state can secure its allotment of the federal grant it must appropriate from local sources a sum at least equal to its allotment, and this appropriation must be spent for the same purpose as that for which the federal grant is made. In the second place, the plans for carrying out the work, formulated by the state agencies, must be approved by a federal agency. This by implication empowers the federal government to finally determine the way in which the joint appropriations are to be used.

The purpose of the Smith-Lever Act is to provide for coöperative agricultural extension work between the agricultural colleges receiving the benefits of federal grants and the United States Department of Agriculture. The funds provided are to be used for extension work. The formulation of plans for conducting this work is left to the agencies in the respective states, but before a state can secure its share of the federal funds its plan for carrying out the program must be approved by the Secretary of Agriculture. The state must also have appropriated, for carrying out the plan, a sum equal to that allotted to it.

The Smith-Lever Act did not directly affect the regularly organized work of educational institutions, and therefore was not identified as an important educational measure. It was important, however, because it was the embodiment of a new scheme in congressional educational legislation — the scheme providing for state partic-

ipation in financing educational programs suggested by Congress, and federal participation in the formulation of plans for carrying out such programs. This plan, first finding expression in the Smith-Lever Act, has since become so common that it threatens to become a fixed principle in federal legislation pertaining to matters which are primarily of state concern.²¹

In 1917 the principle introduced in the Smith-Lever Act was embodied in the Smith-Hughes Act which purported to establish coöperation between the federal government and the states in promoting vocational education in secondary schools and in the training of teachers of vocational subjects.²² Like the Smith-Lever Act, this act provided for a fund to be distributed among the states. To receive its share of the fund a state has to appropriate an equal amount. The act also created a federal administrative agency, the Federal Board for Vocational Education, with powers to approve or reject the plans of the respective state agencies for carrying out the provisions of the act. Before a state can receive its allotment this federal board must have approved the plans of the state board with respect to type of work contemplated, qualification of teachers, and equipment. Obviously, this gives to the states power to initiate plans, but the final determination is left in the hands of the federal government.

²¹ As far as the author has been able to ascertain, the Smith-Lever Act was the first instance of a federal law providing that the money from the federal Treasury must be supplemented by an equal sum from the state. The plan, however, was embodied in earlier proposed legislation which failed of passage. A vocational education bill containing this plan was introduced in the Senate as early as April 6, 1911, by Senator Page of Vermont, *Cong. Rec.* vol. XLVII, pt. 1, p. 101.

²² Act of Feb. 23, 1917, 39 Stat. at L. 929.

The Industrial Rehabilitation Act of 1920 is similar.²³ The purpose of this act, as expressed in its title, is "To provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment." The administration of the law was turned over to the Federal Board for Vocational Education. The same "fifty-fifty" scheme for financing the program is provided for and the federal board is given power to approve or reject the plans of the state agencies with respect to the kind of vocational rehabilitation intended, plans of administration and supervision, courses of study, methods of instruction, and qualifications of teachers and supervisors.

While the Maternity and Infancy Hygiene Act of 1921 is not strictly an educational measure, it is worthy of mention as an act containing the same scheme for federal control.²⁴ This act, as expressed in the title, is "For the promotion of the welfare and hygiene of maternity and infancy." The administration of the act is vested in the Children's Bureau of the Department of Labor, but a special agency, the Board of Maternity and Infant Hygiene, consisting of the Chief of the Children's Bureau, the Surgeon General of the Public Health Service, and the Commissioner of Education, was created with powers to approve or reject the plans of state officials. The method of financing the plan is the same as in the other acts already mentioned.

Finally, a résumé of recent federal educational legislation would not be complete without mentioning the proposed legislation which has aroused serious discussion in academic circles. The legislation referred to is the

²³ Act of June 2, 1920, 41 Stat. at L. 735.

²⁴ Act of Nov. 23, 1921, 42 Stat. at L. 224.

bill originally introduced into the Senate by Senator Hoke Smith of Georgia during the second session of the Sixty-fifth Congress and known in the Sixty-sixth Congress as the Smith-Towner bill, and later as the Sterling-Towner bill.²⁵ This measure proposes to replace the Bureau of Education with a Department of Education which would serve as a coördinating agency for federal educational activities, and the secretary of which would presumably be a member of the President's Cabinet. It also seeks to extend the policy of federal aid and control of education by enlarging appropriations for educational purposes under the "fifty-fifty" plan and by making more general provisions with respect to the purposes for which the federal funds may be used. Instead of limiting itself to dealing with vocational education, as has been the case with former enactments providing for a coöperative plan of financing and control, this measure seeks to remedy in general the patent weaknesses in state educational systems. It aims to eliminate illiteracy, promote americanization of immigrants, and encourage physical education. Such legislation would enable the federal government to carry out its policies in the general field of elementary education in the same way that it has in the more specialized fields of secondary and higher education and would thus tend to establish federal control to a degree hitherto untried.

From the foregoing review of recent legislation it is obvious that there is a tendency for the federal government to increase its control over education. Proponents of such legislation have defended their position on the

²⁵ For a consideration of the original bill see Senate, Committee on Education and Labor Hearings . . . 65th Cong., 2d Ses., on S. 4987; a bill to create a department of education, Dec. 5, 1918, Washington, Government Printing Office, 1919.

ground that education is of national concern and have pointed to the appalling illiteracy and physical unfitness revealed among the men drafted for military service in the recent war.²⁶ But merely to point out that legislation is of national concern is not a valid constitutional defense of such legislation. Practically all constructive measures for the betterment of existing conditions which come in the form of state legislative enactments, state administrative rulings, or ordinances of city councils, might be said to benefit the nation at large. Merely because the nation derives a benefit does not justify congressional control over local policies.

The constitutionality of educational grants legislation has not been questioned in the courts, but an interesting question in constitutional law might be raised. The federal government is not constitutionally vested with powers directly to control education in the states. Can Congress, then, appropriate funds for assisting the states and by this method induce the state legislatures to endorse federal policies? In other words, can Congress, by the use of federal funds encourage the state legislatures to adopt policies which Congress could not directly force upon the states? Are such appropriations constitutional? If they are constitutional, Congress is empowered to bring pressure to bear upon state legislatures and in this manner accomplish indirectly what it could not accomplish by direct legislation. Apparently Congress can determine the conditions under which federal funds will be given to the states. Granting the consti-

²⁶ See Horace M. Towner, "Federal Aid to Education, Its Justification, Degree, and Method"; Thomas Sterling, "Constitutional and Political Significance of Federal Legislation on Education," in *University of Illinois Bulletin*, vol. XIX, No. 17, Dec. 26, 1921, pp. 77-97.

tutionality of state aid legislation, Congress could then withhold these grants until the states had accomplished certain desirable results. In this way the states might be induced to undertake reforms which Congress could not reach. The attempts of Congress to regulate child labor through its constitutional powers of regulating interstate commerce and levying taxes have been declared unconstitutional by the Supreme Court.²⁷ But child labor legislation has generally been associated with free and compulsory education. Therefore, it would appear that Congress could decide, as a condition to its grants for educational purposes, that the states desiring to take advantage of these grants must enact and enforce child labor laws which conform with the standards fixed by Congress. Coöperation between the federal government and the states on a fifty-fifty basis is a new experiment. But it has already been attempted in connection with the promotion of public health, the improvement of highways, the encouragement of scientific agriculture, and the advancement of education. The plan is pregnant with possibilities for the further extension of federal influence in the determination of state policies. To what extent it will be carried will depend on the attitude of Congress towards this kind of legislation, the restrictions which might be fixed by the courts, and the awakening of public opinion in the states to the need of remedying defects within their jurisdictions to such an extent that federal interference will become less necessary.

The question of the constitutionality of the recent federal educational legislation, in the absence of judicial decisions, is purely academic. But more important than

²⁷ *Hammer v. Dagenhart*, 1918, 247 U. S. 251; *Bailey v. Drexel Furniture Company*, 1922, 66 L. Ed. 522.

the question of whether such measures are constitutional is the question of whether the method employed is a desirable one for attaining the goal at which the legislation is aimed. While education is a national problem, it must also be recognized as a peculiarly local interest. Courses of study and educational methods suited to one locality may not be adaptable to another, and attempts to apply national standards, while helping the more backward communities, might be retarding the more progressive sections. Education is a creative interest. Such an interest needs a certain degree of freedom if it is to flourish. Conformity to too rigid rules is deadening. It is a lamentable fact that in some of the school systems of our larger cities where education *en masse* is necessitated, the learning process has been reduced to a conformity with rules emanating from central agencies; the individuality of teachers and students have been submerged and the result is collective mediocrity. National control of education, if it should result in the imposition of rigid standards, would tend to submerge, not only individuals, but entire communities in a system which might not be adapted to local interests and problems. Administrative rulings emanating from Washington can not be expected to be detailed enough to cover local needs. If they are voiced in general terms they will require interpretation by administrative officials. Unfortunately, these officials often lack a broad training and sympathy, and even if they have vision they are likely to be enmeshed in red tape. The result is that they seek to play safe by conforming with the letter of the administrative order, often to the distress of the locality concerned. Annoying situations often resulted even

under the liberal provisions of the land grant colleges acts.²⁸

The fifty-fifty plan of financing and controlling educational programs threatens to become an accepted policy of Congress. It is questionable if this plan is not wrong in principle. It gives the federal government power to determine how the state appropriation as well as the federal grant is to be expended. State legislators are apt to feel that, in meeting the conditions specified in the federal enactment, they are getting something for nothing, and hence funds will be appropriated for the purposes desired by Congress to the neglect of more pressing needs in the educational system of the state. With Congress supporting vocational training and causing the states to make special appropriations for its encouragement, it is difficult to maintain a well balanced curriculum. It is also difficult to frame a budget for a general, balanced educational system when certain integral parts of that system are favored by special appropriations and subjected to special control.

The creation of an executive department of education would probably be an improvement. There is need of a coördinating agency. At present a number of administrative agencies such as the Bureau of Education, the Bureau of Insular Affairs, the Board for Vocational Education, and the Children's Bureau are engaged in educational work. These agencies are now scattered and uncorrelated, and if gathered within a department a better opportunity might be offered for coöperation and more coherent programs might result. Such a depart-

²⁸ See E. W. Allen, "Problems of Administering Federal Appropriations to State Institutions"; W. O. Thompson, "Problems of State Universities in Administering Federal Funds," in *University of Illinois Bulletin*, vol. XIX, No. 17, Dec. 26, 1921, pp. 47-67.

ment could do constructive work in a spirit of friendly coöperation with state and local agencies through the promotion of research, the distribution of information, and the creation of a public opinion favorable to education. For the federal government to attempt to control education in the states through such an agency would probably be a mistake.

The tendency for the federal government to exercise a control over education has been due to the failure of some of the states to deal properly with a subject which constitutionally belongs to them. The remedy is not federal control, but better state control. It would be considered absurd to contend that the states should assume control of the postal service because the federal government has sometimes badly managed this service. It is equally unsound to contend that, because a state has been negligent in the promotion of education, the federal government should assume control. The backward states and localities need to be awakened. They will be awakened by reports from the more progressive sections. Lack of uniformity of educational standards in the United States is not a sign of hopelessness. In countries like Germany and France where education is more standardized on a national scale there are no local school systems so faulty as our worst, but there are none so progressive as our best. Among our states and localities the more progressive will be emulated by the more backward and better schools will result. Under state and local control educational policies will be experimented with and those best suited to local needs will be adopted. Under federal control there would be a danger of having a standardized inflexible system imposed, and this plan might not be conducive to the best results in different localities.

Educators have generally taken the view that control of education is a function which inherently belongs to the states. This view is admirably stated by President Thompson in the following words:

Unless I misinterpret the sentiment among public school men throughout the country, it is clear that they are steadily coming to the belief that the mission of the public educational institution is to discover if possible the needs of society and to minister to those needs through an education adapted to the situation. They believe that such a process will create the highest ideals in education and develop the greatest national strength. If such a point of view is to be accepted as correct, then the federal government will immeasurably fail if it undertakes to insist upon the domination or control of education through acts of Congress or a federal agency. There always will be a place for federal supervision and inspection but a much smaller place for federal control. The administration, therefore, of education whatever form it may take should recognize the administrative importance of the commonwealth as superior to the importance of the federal government. As a matter of fact, by far the greater portion of the revenues must eventually be collected locally. The administration of the entire sums devoted to education requires that each community make an accounting of itself, a deliberate study of its program and be responsible for a suitable administration of the funds. The function of the federal government, therefore, in such connection is that of supplementary service based upon the national need for education.²⁹

²⁹ W. O. Thompson, in *University of Illinois Bulletin*, vol. XIX, No. 17, Dec. 26, 1921, p. 67.

CHAPTER X

INTOXICATING LIQUORS — FEDERAL REGULATION

CONGRESS, prior to constitutional prohibition, pursued a negative rather than a positive policy in the regulation of intoxicating liquors. Not until the passage of the Eighteenth Amendment did Congress attempt to establish prohibition throughout the United States. Prior to that time whatever federal measures were enacted with reference to the liquor traffic were intended to create conditions under which the states could more freely exercise their police powers in regulating this traffic. Legislation on the subject of intoxicating liquor, therefore, was different from that pertaining to pure food and drugs, lotteries, child labor, and vice where there was a positive prohibition from using the agencies of interstate commerce for the furtherance of certain disapproved practices. Congress positively registered its disapproval on these questions. Regardless of what the individual states desired, Congress sought to discourage these practices and to prohibit them if it could do so constitutionally under its power to regulate interstate commerce. This was not the attitude towards regulating the liquor traffic. On the question of liquor, until quite recently, the attitude was one of neutrality. It was assumed that this was a problem for the respective states, and such measures as the Wilson Act and the Webb-Kenyon Act were intended to withdraw federal regulation in order that the states might be unhampered in

subjecting this traffic to their respective police regulations. While this policy may have appeared weak and halting, it was consistent. Congress was not ready to declare for prohibition, and yet it did not wish to restrain the prohibition states in the enforcement of their laws.

The policy pursued by Congress can be accounted for by the peculiar legal status which the liquor traffic had in the United States. Subjecting trafficking in liquors to governmental regulation is an old and established policy under English law. It antedates our Constitution, and governmental regulation was always the policy in the different states. That there was no constitutional right to sell intoxicating liquors at retail, or to manufacture and sell, and that such a right did not inhere in citizenship was held in a number of decisions.¹ In the case of *Delamenter v. South Dakota* ² the Supreme Court went to the extent of upholding a state law which imposed an annual license on traveling salesmen offering for sale or soliciting orders for intoxicating liquors. It was held that this was a police regulation and not an act for the purpose of taxation. Were it not for the fact that the liquor traffic had always been subject to police regulations, it would be difficult to reconcile the holding in this case with the decision in the case of *Robbins v. Shelby County Taxing District* ³ where a Tennessee statute requiring a license of salesmen selling by sample, as applied to salesmen representing firms outside of the state, was held to be unconstitutional as an interference with interstate commerce.

¹ *Mugler v. Kansas*, 1887. 123 U. S. 623. *Crowley v. Christensen*, 1890, 137 U. S. 86. *Cronin v. Adams*, 1904. 192 U. S. 108. *Bartmeyer v. Iowa*, 1873. 85 U. S. 129.

² 205 U. S. 93. 1907.

³ 120 U. S. 489. 1887.

However, while the traffic was subject to state police regulations, liquor was considered a legitimate subject of commerce and interstate shipments came under federal regulation. It was not left to the states to determine what is commerce. "What is commerce," the Supreme Court has said, "is determinable by the usages of the commercial world and does not depend upon the declaration of any State."⁴ In a number of decisions, dating back to as early as the License Cases,⁵ the Supreme Court held that intoxicating liquor was a legitimate subject of commerce and that interstate shipments of liquor constituted interstate commerce. In the case of *Austin v. Tennessee*⁶ it was noted that cigarettes could not be classed with diseased cattle or meats, decayed fruit, or other articles the use of which is a menace to the health of the entire community. Liquor occupied a status similar to that of cigarettes. Interstate shipments came under the regulation of the federal government and intrastate trafficking came under the jurisdiction of the states. This gave rise to an anomalous situation in that a state could prescribe the conditions under which liquor could be sold within its borders but could not prescribe the conditions under which it could be brought in from another state. This is shown in the case of *Vance v. W. A. Vandercook Co.*⁷ This was a case arising out of a statute of the state of South Carolina which compelled residents of the state who desired to order liquor for their own use first to communicate their purpose to a state chemist, and which deprived non-residents of the

⁴ *Bowman v. Chicago and Northwestern Railroad Company*, 1888. 125 U. S. 465, at 501.

⁵ 5 Howard 504, 582, 583, L. Ed. 256. 1846.

⁶ 179 U. S. 343. 1900.

⁷ 170 U. S. 438. 1898.

right to ship by means of interstate commerce any liquor into South Carolina unless previous authority had been obtained from the officers of the state. The Supreme Court held this act unconstitutional. In delivering the opinion of the court, Mr. Justice White said, "The right of the citizen of another state to avail himself of interstate commerce can not be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the State; it takes its origin outside of the State of South Carolina and finds its support in the Constitution of the United States. Whether or not it may be exercised, depends solely upon the will of the person making the shipment and cannot in advance be controlled or limited by the action of the State in any department of its government."⁸ The division of powers between the federal government and the states with regard to regulating the liquor traffic is stated in the *Vandercook Case* in the following words: "In the inception it is necessary to bear in mind a few elementary propositions which are so entirely concluded by the previous adjudications of this court that they need only be briefly recapitulated:

(a) Beyond dispute the respective States have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the States, provided always they do not transcend the limits of State authority by invading rights which are secured by the Consti-

⁸ *Vance v. W. A. Vandercook Co.*, 1898. 170 U. S. 438, at 455.

tution of the United States, and provided further that the regulations as adopted do not operate a discrimination against the rights of residents of other States of the Union.

(b) Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence that a State law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.”⁹

While this distinction between the jurisdictions of the central government and the states was clearly drawn, the application of the principle was attended with difficulty and the states which had adopted prohibition found themselves handicapped in the enforcement of their laws. These laws could be enforced against residents but not against non-residents. A state could prevent one resident from selling liquor to another resident, but it could not prevent an outsider from shipping liquor to a resident. It could forbid selling to minors or regulate the quality of liquor sold within its borders, but a non-resident was not bound by these regulations in making interstate shipments. The states which had adopted prohibition begged that this situation might be adjusted, basing their plea on the right of the individual states to determine their own policy towards the liquor traffic. What was asked was that the federal government should limit the exercise of its power to regulate interstate commerce in such a manner that the states could exercise their police powers in regulating the liquor traffic without coming into conflict with the federal government. Urging the

⁹ *Vance v. Vandercook Co.*, 1898. 170 U. S. 438, at 444.

adoption of his bill in the Senate, Senator Wilson said, "It is a bill to grant to the States what may be called a local option, to allow them to do as they please in regard to the liquor question. They can have prohibition, high license, local option, or free liquor, as they please."¹⁰ Senator Kenyon used a similar argument for the adoption of the Webb-Kenyon Bill. "Its purpose," he declared, "and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their borders."¹¹ It was to give to the states this freedom that such measures as the Wilson Act and the Webb-Kenyon Act were enacted.

The conflict between the central government and the states over the regulation of the liquor traffic is of comparatively recent origin. The Wilson Bill, which was the first instance of Congress yielding in the regulation of interstate commerce in order to permit the states more freely to enforce their prohibition laws, was passed in 1890. The immediate cause for the enactment of the Wilson Bill was the well-known decision in the case of *Leisy v. Hardin*.¹² Prior to this decision, however, the Supreme Court had held that an Iowa statute prohibiting common carriers from bringing liquor into that state from any other state without first being furnished with a certificate of the auditor of the county to which it was to be transferred to the effect that the consignee was authorized to sell intoxicating liquors in that county was unconstitutional on the ground that it was not a legitimate exercise of police power, but sought to regulate the

¹⁰ *Cong. Rec.*, vol. 21, pt. 5, p. 4904.

¹¹ *Cong. Rec.*, vol. 40, pt. 1, p. 707.

¹² 135 U. S. 100. 1890.

conduct of commerce before the merchandise reached the borders of the state.¹³ The decision in the case of *Leisy v. Hardin* brought to a head the question of federal interference with the enforcement of state prohibitory laws. This decision declared that a general prohibition law of the state of Iowa, was, as applied to a sale by the importer and in the original packages or kegs, unbroken and unopened, of liquors manufactured in and brought from another state, unconstitutional and void as repugnant to the clause of the Constitution granting to Congress the power to regulate interstate commerce. This decision was a serious blow to the enforcement of state liquor laws. "Original package" saloons sprang up in prohibition states in place of those that had been closed by the state laws. Through a liberal interpretation of the original package doctrine, retailing liquor in "dry" territory was not seriously affected by state laws. In Iowa the court held that where beer put into sealed bottles and packed in boxes was sent by a non-resident into the state, consigned to an agent, and the agent prior to the passage of the Wilson Bill, merely removed the bottles from the boxes, furnished a cork screw and tumblers, and allowed the customers to open for themselves, the sale was in the original packages, and not, therefore, within the prohibitory liquor law.¹⁴ Other courts were equally liberal in construing this doctrine. In Alabama it was held that where boxes were furnished by the carriers and fastened to the car, so as virtually to become a part of the car, the bottles separately wrapped and directed were the original packages.¹⁵ Such

¹³ *Bowman v. Chicago and N. W. Ry. Co.*, 1886. 125 U. S. 465.

¹⁴ *State v. Miller*, 1892. 86 Iowa 638.

¹⁵ *Keith v. State*, 1890. 91 Ala. 2.

holdings show how, under the decision in *Leisy v. Hardin*, a state prohibitory law could be limited in its application.

The Wilson Bill was passed to relieve this situation. This law provided that "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquor or liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."¹⁶

This law came up for consideration in the case of *In re Rahrer*¹⁷ where the question involved was whether liquors in the original packages could be sold in the state of Kansas under a law of the state forbidding its manufacture and sale. The law was sustained, the court holding that its effect was to subject to the operation of the police power of the state certain subjects which were theretofore excluded from its operation by reason of their being subjects of interstate commerce, and that it was not a delegation to the states of the power to regulate commerce, nor an adoption of state laws as such regulation.

The question of when the state law would attach to an interstate shipment of liquor was not clearly indicated in the Wilson Bill. Evidently the measure was purposely left vague on that point. Two amendments indicating when state laws would start operating were offered to

¹⁶ Act of Aug. 8, 1890, 26 Stat. at L. 313.

¹⁷ 140 U. S. 545. 1891.

the bill during the debate in the Senate. Senator Faulkner submitted an amendment which provided that the state laws should not operate until the goods had been delivered to the consignee,¹⁸ and Senator Blair's amendment would have permitted the state laws to operate as soon as the shipment had crossed the border.¹⁹ Both of these amendments were rejected by the Senate. Senator Wilson himself did not appear to have had a clear idea of what was meant by "arrival," but considered the termination of the shipment to be the town or railroad station to which the shipment was sent.²⁰ This question was finally settled by the court in the case of *Rhodes v. Iowa*²¹ where it was held that the state law did not attach to the shipment until the goods had arrived at their destination and had been delivered to the consignee.

While the Wilson Act permitted state laws to operate against a shipment of liquor while still in the original package, those laws could operate only after delivery to the consignee. The states were unable to prevent shipments from coming in from other states. Common carriers could not be restrained by state laws from bringing liquor into the state;²² a state could not prescribe conditions under which a non-resident could ship liquor into the state;²³ a reasonable time had to be allowed for the consignee to receive the goods from the carrier

¹⁸ *Cong. Rec.* vol. 21, pt. 6, p. 5375.

¹⁹ *Cong. Rec.* vol. 21, pt. 6, p. 5384.

²⁰ *Cong. Rec.* vol. 21, pt. 6, p. 5376.

²¹ 170 U. S. 412. 1898.

²² *Rhodes v. Iowa*, 1898. 170 U. S. 412. *Adams Express Co. v. Kentucky*, 1909. 214 U. S. 218. *Louisville and Nashville Ry. Co. v. Cook Brewing Co.*, 1912. 223 U. S. 70.

²³ *Vance v. Vandercook Co.*, 1898. 170 U. S. 438.

during which the state could not interfere;²⁴ and a c.o.d. shipment could be sold in the original package before the power of the state could attach.²⁵

These conditions led the prohibition states to demand that Congress yield further in the exercise of its power to regulate interstate commerce, and that it should positively prohibit the shipment of intoxicating liquor into states when such liquor was to be used in violation of state laws. Congress again yielded to a popular demand and passed the Webb-Kenyon Act. This act provided that "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."²⁶

Stripped of its verbiage the Webb-Kenyon Act simply meant that interstate shipments of intoxicating liquors into a state where it would be used in violation of local

²⁴ *Heyman v. Southern Railway Co.*, 1906. 203 U. S. 270.

²⁵ *American Express Co. v. Iowa*, 1905. 196 U. S. 133.

²⁶ 37 Stat. at L. 699. This bill was passed over the President's veto March 1, 1913.

regulations was prohibited. At first glance this law would indicate that Congress had changed its policy and was ready to assume an aggressive attitude towards the regulation of the liquor traffic, but upon closer analysis quite the contrary is shown. Congress was merely receding a step farther than it had in the Wilson Act. The language of the act might lead one to conclude that the federal government would prohibit interstate shipments of liquor under certain conditions. But the law was without a penalty. Neither did it state against whom it would operate, whether common carriers or distillers. It simply meant that Congress would wash its hands of the whole question of interstate commerce in liquors. If a common carrier or a brewery in a "wet" state carried liquor into a "dry" state, the federal government would not prosecute; but if the local authorities confiscated the liquor before delivery to the consignee, the injured party could not plead the commerce clause as a defense. This would practically mean that interstate shipments of liquor would be subject to the regulations of the different states. Was this a surrender by Congress to the states of the power to regulate interstate commerce in intoxicating liquors? It was on this question that the Webb-Kenyon Act encountered serious opposition in the Senate where it was opposed by some of the ablest men. Senator Root, speaking against the measure, declared, "What is proposed in this bill is that the Government of the United States shall hand over to the government of each State the right to say how and when and under what conditions interstate commerce in these articles of commerce, so treated and regarded by all the States, shall be had."²⁷ It was on this same

²⁷ *Cong. Rec.* vol. 49, pt. 3, p. 2915.

question that the Attorney General declared the bill to be unconstitutional.²⁸ The President vetoed the measure for the same reason. In his veto message, President Taft said, "After giving this proposed enactment full consideration, I believe it to be a violation of the interstate commerce clause of the Constitution, in that it is in substance and effect a delegation by Congress to the states of the power of regulating interstate commerce in liquors which is vested exclusively in Congress."²⁹

The most recent expression of the court on the subject at the time of the passage of the Webb-Kenyon Act was the decision in the case of *Louisville and Nashville Ry. Co. v. F. W. Cook Brewing Company*.³⁰ In delivering the unanimous opinion of the court in this case, Mr. Justice Lurton said:

By a long line of decisions beginning even prior to *Leisy v. Hardin* (135 U. S. 100) it has been indisputably determined:

(a) That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce.

(b) That it is not competent for any State to forbid any common carrier to transport such articles from a consignor in one State to a consignee in another.

(c) That until such transportation is concluded by delivery to the consignee such commodities do not become subject to State regulation, restraining their sale or disposition.³¹

With the enactment of the Webb-Kenyon Act a new situation arose. The effect of this act was that the federal government had yielded to the states. It was the laws of the various states and not of the central govern-

²⁸ Opinion of Attorney General George W. Wickersham, 30 Op. A. G. 88.

²⁹ *Cong. Rec.* vol. 49, pt. 5, p. 4291.

³⁰ 223 U. S. 70. 1912.

³¹ 223 U. S. 70, at 82. 1912.

ment that determined whether or not an interstate shipment of liquor was prohibited by the Webb-Kenyon Act. The states, then, after the enactment of the Webb-Kenyon Act, were actually competent to forbid a common carrier to transport liquors from a consignor in one state to a consignee in another, and the laws of the states would attach to the shipment before delivery to the consignee.

Another situation created by the Webb-Kenyon Act was that there might be a lack of uniformity in the regulations adopted towards interstate shipments of liquor. Since the laws of the different states now determined whether or not an interstate shipment of liquor was illegal, obviously there could be no uniform rules governing this article of commerce. The Webb-Kenyon Act made the transportation of liquor subject to whatever laws might thereafter be passed by any state. It was legal to ship liquor into a "wet" state, but if that state became "dry" the shipment became illegal; if the state adopted a policy of high license, it became illegal to bring in liquor which was intended to be disposed of in violation of this regulation; if the state had local option, it might be legal to transport liquor into one county and illegal to transport it into another. The forty-eight states could have adopted as many different policies towards the transportation, the sale, and the use of intoxicating liquors; and all of these policies would have determined the legality of interstate shipments in these articles under the Webb-Kenyon Act. It is interesting to observe that, while such lack of uniformity in the regulation of interstate commerce in liquors was made possible by an act of Congress, the courts have held that the reason Congress was given the power to regulate interstate com-

merce was to secure uniformity. In the case of *Mobile v. Kimball* the court said, "It is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating State legislation."³² In the case of *Bowman v. Chicago and Northwestern Ry. Co.* the court declared, "It is of national importance that over that subject there should be but one regulating power."³³

The constitutionality of the Webb-Kenyon Act was considered in the case of *Clark Distilling Company v. Western Md. Ry. Co.*³⁴ The question involved in this case was whether, under the provisions of the Webb-Kenyon Act, a distilling company in the state of Maryland could compel a railroad to carry liquor into the state of West Virginia when a statute of West Virginia prohibited carriers from bringing into the state liquors intended for personal use. The court held that the Webb-Kenyon Act operated to give effect to the prohibitions of the statute of West Virginia by withdrawing from such shipments the immunities of interstate commerce. It declared that since Congress could totally prohibit the interstate transportation of intoxicating liquor it had the lesser power, exercised in the Webb-Kenyon Act, of adapting the regulation to the various local requirements and conditions that might be ex-

³² 102 U. S. 691. 1880, at 697.

³³ 125 U. S. 465, at 481, 1888. Similar *dicta* may be found in *Western Union Telegraph Co. v. Pendleton*, 1887. 122 U. S. 347, at 358. *Steamship Co. v. Port Wardens*, 1867. 6 Wall. 31, at 33. *Inman Steamship Co. v. Tinker*, 1876. 94 U. S. 238, at 245. *Leisy v. Hardin*, 1890. 135 U. S. 100, at 112.

³⁴ 242 U. S. 311. 1917.

pressed in the laws of the states. The court further stated that this method of regulation did not take effect unequally because it applied uniformly to the "conditions which call it into play," and, furthermore, that the power to regulate commerce was not subject to the restriction that regulations shall be uniform throughout the United States.

While the court held that the Webb-Kenyon Act applied uniformly to the conditions that called it into play, those conditions, as expressed through state laws, were not uniform. What was prohibited in one state was permitted in another. What was prohibited by a federal statute might even be encouraged and enforced by a state law. This actually happened in connection with the enforcement of a prohibition law of the state of North Carolina. A federal statute forbade the divulging of information by interstate carriers except under certain conditions.³⁵ A statute of the state of North Carolina required carriers to keep records of interstate shipments of liquor open for the inspection of any officer or citizen.³⁶ On the question of which of these conflicting statutes should yield, the court held that, since the Webb-Kenyon Law had subjected interstate shipments of intoxicating liquor to state legislation, the statute of North Carolina was valid.³⁷ To what extent should a federal law yield to a state law on the same subject when the federal enactment was an exercise of a power vested exclusively in the national government? The Eighteenth Amendment establishing national pro-

³⁵ 36 Stat. at L. 539, 551, 553.

³⁶ Sec. 5, North Carolina Public Laws, 1913, chap. 44, p. 76.

³⁷ *Seaboard Air Line Ry. v. State of North Carolina*, 1917. 245 U. S. 298.

hibition evidently saved the courts from some vexatious questions by making the Webb-Kenyon Law obsolete.

The Wilson Act and the Webb-Kenyon Act were not prohibition laws. They were merely intended to lend effect to state laws by withholding the immunities of interstate commerce. They were attempts by Congress to coöperate with the states in regulating a traffic which historically had been subject to state regulation. There was no uniformity of standards in the regulations adopted by the different states and Congress was not ready to set up a standard for all of them. Consequently in the Wilson Act and in the Webb-Kenyon Act, Congress adopted a recessive policy of yielding in its power to regulate interstate commerce to the power of the states to make police regulations. These acts were not laws in the sense that they provided a penalty in case they were violated. They were rather statements of policy, and the states could act or refrain from acting in the enforcement of their respective regulations.

However, the policy of leaving the regulation of the liquor traffic to the states was not entirely passive. There were instances when Congress actively exercised its power to regulate interstate commerce to assist the states in the enforcement of their liquor laws. Sections 238, 239 and 240 of the Penal Code ³⁸ forbid under penalty:

(1) The delivery of intoxicating liquor to any person other than the consignee, unless upon his written order, or to any fictitious person;

(2) The collection of the purchase price of intoxicating liquor by any common carrier acting as agent of the buyer or seller;

³⁸ For these sections see 35 Stat. at L. 1136 and 1137.

(3) The shipment of any liquor unless labeled on the outside to show the name of the consignee, the nature of the contents, and the quantity contained.

By these provisions the local authorities could easily have ascertained whether liquor was being delivered in their localities and to whom. Congress certainly cannot be censured for an unwillingness to coöperate with the state authorities. But even the prohibition states were not ready to take the final step in prohibiting an avowed evil. No state had yet ventured to prohibit the consumption of intoxicating liquor. When Congress passed the Webb-Kenyon Act it might have gone a step farther and outlawed intoxicating liquor as a subject of interstate commerce as it had done with lottery tickets. But the country evidently was not ready for such a step. When one considers the state of public opinion on the liquor question in the different states as expressed through state liquor laws, it is difficult to see how, under its power to regulate interstate commerce, Congress could have pursued a different policy towards the liquor traffic from that of attempting to coöperate with the states.

Prior to the adoption of the Eighteenth Amendment Congress showed signs of adopting a more aggressive attitude towards the liquor traffic. There was a popular reaction in the warring countries against the consumption of intoxicating liquor and this was reflected in the American press to the advantage of the cause of prohibition. There was also a general dissatisfaction in the United States with the way the dual control of the traffic was working out. Consequently Congress ventured a step farther than it had done theretofore by enacting the

Reed " Bone-Dry " Amendment in March, 1917.³⁹ This was passed as an amendment to the Post Office Appropriation Act of 1917. It provided that " Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished. . . ."

This provision was upheld by the Supreme Court.⁴⁰ According to the interpretation of the court this amendment was a positive prohibition and was not limited by state liquor laws but forbade shipments of liquor for personal use into " dry " states which permitted the personal use of liquor but did not permit the manufacture or sale.⁴¹ This amendment, however, was in operation for only a brief period before it was replaced by " war-time " prohibition and by the Volstead Act enforcing the Eighteenth Amendment. Consequently it was of interest mainly as an example of a positive prohibition regulation receiving its constitutional authorization, not from an amendment to the Constitution, but from the commerce clause.

In summary, it can be said that, prior to the adoption of constitutional prohibition, the policy of Congress with reference to the liquor traffic was to coöperate with the states by withholding the immunities of interstate commerce from shipments of intoxicating liquors. Prior to our entrance into the World War, public opinion had not become either general or settled with regard to the liquor

³⁹ Act of March 3, 1917; 39 Stat. at L. 1069.

⁴⁰ *United States v. Hill*, 1919. 248 U. S. 420.

⁴¹ 248 U. S. 420.

traffic. For this reason Congress adopted a policy of trying to maintain state rights in dealing with the question. With the adoption of the Eighteenth Amendment the pendulum swung to the opposite extreme and the right of the states to regulate the liquor traffic became past history.

CHAPTER XI

INTOXICATING LIQUORS — NATIONAL PROHIBITION

It was noted in the previous chapter that, prior to the adoption of the Eighteenth Amendment, the attitude of Congress towards the liquor traffic was passive. Congressional enactments, in the main, were directed to remove possible impediments to the enforcement of the state laws. The laws on the subject in each state varied from those of other states, but within their borders the states, in the main, determined the regulations. The federal enactments were intended to aid the states in the enforcement of their liquor laws. With the adoption of the Eighteenth Amendment and subsequent federal legislation all this was changed. The federal enactments became the chief law on the subject, and state regulations have been enacted to aid in the enforcement of federal legislation. The pendulum swung completely from state control to federal control. This change was as rapid and as startling as it was revolutionary. The year ending June 30, 1914, was considered the banner year for the American brewer. In that year a total of over sixty-six million barrels of beer was produced in the United States. The value of the product for the year approached half a billion dollars. The brewing industry was ranked sixth in the country in point of capital involved.¹ In less than five years this industry had been outlawed by federal

¹ This data is taken from the *United States Brewers Association Year Book* for 1919 (New York, 1920), p. 5.

legislation in conformity with a constitutional amendment.

The rapid growth of public sentiment for national prohibition from 1914 to 1919 can be attributed largely to the unusual state of public opinion resulting from the World War. The prohibitionists, by organized propaganda, had managed to keep the question in the foreground. Owing to the war their cause assumed a new phase. Many who had formerly looked upon prohibition merely as morals legislation now viewed it as a practical and desirable program. The warring countries were making regulations to restrain the liquor traffic and this was advertised to the advantage of the cause of prohibition in this country. When the United States entered the war the people were moved by heroic impulses and were ready to take drastic measures to bring the war to a successful conclusion. Sacrifices were common and commendable, and considerations for personal convenience were held in disrepute. The attention of the people was focused on one thing. They were willing to forego personal considerations. They were motivated by the common desire expressed in the popular slogan, "Win the War." Prohibition became associated with winning the war. War-time regulations of the liquor traffic preceded constitutional prohibition.

The first war measure regulating the manufacture and sale of intoxicating liquor was the Act of August 10, 1917, better known as the Lever Act.² This act, among other things, authorized the President to make regulations for the conservation of food and fuel. It forbade the use of food products for the manufacture of distilled liquors for beverage purposes, but provided that the

² 40 Stat. at L. 276.

President could make exceptions for distilling for other than beverage purposes. Under his authority to conserve food and fuel, conferred upon him by the Lever Act, the President also had power to curtail the use of food stuffs in the manufacture of wine and beer. Pressure was brought to bear upon the President to exercise the powers conferred upon him by the Lever Act and bring about national prohibition for the duration of the war by executive proclamation.³ President Wilson, however, did not see the necessity of taking such extreme measures, and the next step was taken by Congress in the passage of what has been known as the War Prohibition Act.⁴

For being unprincipled and illogical the act establishing war-time prohibition is exceptional even in American legislation. The provisions dealing with prohibition were included in an agricultural appropriation bill. The title announces that it is "An Act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June 30, nineteen hundred and nineteen, the purpose of the act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products' and for other purposes." Even more absurd, however, was the fact that the bill did not become law until November 21, 1918, or ten days after the armistice was signed. War-time prohibition was not established until after the end of hostilities and would not go into effect until nearly eight months after the signing of the armistice. The bill,

³ On September 2, 1917, President Wilson transferred the duty of making liquor regulations to the Treasury Department. The brewers continued to manufacture beer of 2.75 per cent standard in accordance with the regulations of this department.

⁴ Act of November 21, 1918, 40 Stat. at L. 1045 at 1046.

however, carried necessary appropriations, and the President had no choice but to sign it.

The portion of the act dealing with war-time prohibition contained four principal provisions. (1) It made it unlawful to sell any distilled spirits for beverage purposes after June 30, 1919, to the conclusion of the war and demobilization. (2) After May 1, 1919, to the conclusion of the war and demobilization no food products could be used in making intoxicating liquor for beverage purposes. (3) After June 30, 1919, to the conclusion of the war and demobilization no intoxicating liquor could be sold for beverages except for export. (4) It made it unlawful to import intoxicating liquor after the approval of the act to the close of the war. It was left to the President to determine when the war and demobilization had terminated.

The War Prohibition Act created an anomalous situation. Hostilities were at an end and demobilization was progressing rapidly. But the peace negotiations were protracted and the war was not technically ended until peace was declared. Finally, on May 20, 1919, President Wilson, in his message to Congress, urged that the Act be amended or repealed in so far as it applied to wines and beer.⁵ Congress did not act upon the President's suggestion, but instead began work on the Volstead Act in conformity with the Eighteenth Amendment. War-time prohibition did not have time to go into operation before it was replaced by constitutional prohibition. By the terms of the Act it should not become operative until July 1, 1920. The Commissioner of Internal Revenue, who was charged by the War Prohibition Act with the duty of determining the rules and

⁵ For this message, see *Cong. Rec.*, vol. 58, pt. 1, p. 42.

regulations for applying the law, had announced that the act would be applied to all beverages containing more than a half of one per cent alcohol. A number of brewers sought to enjoin this action. The Supreme Court, however, sustained the law, and it was held that the ruling of the administrative official would stand, and that the brewers could not produce facts to show that liquor of a higher alcoholic content was non-intoxicating.⁶

The Lever Act and War Prohibition Act were guised as war measures. While the War Prohibition Act became law after the armistice was signed and by its terms would not become effective until more than seven months after the end of hostilities, it still purported to bring success to American arms. Before war-time prohibition went into effect the Eighteenth Amendment had been ratified by the required number of state legislatures and formed part of the Constitution.⁷ This amendment provides that:

(1) After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

(2) The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

(3) This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legis-

⁶ *Hamilton v. Kentucky Distillers and Warehouse Co.*, 1919, 251 U. S. 146; *Rubbert v. Caffey*, 1919, 251 U. S. 264.

⁷ The resolution proposing this amendment passed the House of Representatives with the required two-thirds majority on December 17, 1917, and was accepted by the Senate on the day following. The ratification by the state legislatures was rapid. On January 16, 1919, it was ratified by the legislature of the state of Nebraska which completed the ratification of the required number of states.

latures of the several states, as provided by the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

It will be observed that the Eighteenth Amendment did not attempt to define "intoxicating liquors." Neither did it provide for any administrative machinery to carry out its provisions. These gaps had to be filled in by supplementary legislation. This supplementary legislation was furnished by the National Prohibition Act of October 28, 1919, better known as the Volstead Act.⁸ By the enactment of the Volstead Act Congress sought to do two things. In the first place, it defined intoxicating liquor as any liquor of more than one half of one per cent alcoholic content and provided for administrative machinery to prohibit the manufacture and sale of such liquor for beverage purposes. In the second place, it sought to retain war-time prohibition until the Eighteenth Amendment should become operative. There was thus a confusion of war-time prohibition and constitutional prohibition. For this reason President Wilson, on October 27, 1919, vetoed the measure in a special message to Congress.⁹ The advocates of prohibition, however, had complete control of Congress and the bill was passed over the President's veto on the following day.¹⁰

⁸ 41 Stat. at L. 305.

⁹ *Cong. Rec.*, vol. 58, pt. 8, p. 7607.

¹⁰ Since the enactment of the Volstead Act minor supplementary measures have been enacted. The most important of these is probably the Willis-Campbell Bill, Act of November 23, 1921, 42 Stat. at L. 222. This makes additional regulations to the Volstead Act, and especially seeks to regulate the use of intoxicants for medicinal purposes. Prior to this enactment Attorney-General Palmer had ruled that beer could be sold for medicinal purposes and that the administrative agency was without authority to limit the number of permits to manufacture and sell within any state or locality. This ruling was written March 3, 1921. See 32 Op. A. G. 467.

It is needless here to attempt to describe the administrative machinery for carrying out the provisions of the Volstead Act. Suffice it to say that Congress, acting in conformity with a constitutional provision, had defined intoxicating liquor, prohibited its manufacture and sale, and that the administrative officials who were charged with the duty of carrying out the provisions of the law were starting out on a program of vigorous enforcement. The effect of this legislation was tremendous. For arousing popular approval and disapproval it was probably unprecedented in the history of American legislation. As a general rule federal legislation does not affect persons directly and consequently does not arouse a personal reaction towards the law. But the Eighteenth Amendment and the Volstead Act were exceptions to this rule. They were far-reaching and potent in their application. One of the largest businesses of the country had been outlawed by this legislation, and a considerable portion of the population felt that such regulation amounted to an interference with their personal and property rights.

It was not to be expected that the constitutionality of such legislation would remain unchallenged. Every conceivable plea was advanced to prove that the Volstead Act and even the constitutional amendment itself were contrary to the Constitution. In the case of *Hawke v. Smith*¹¹ the finality of the action of the state legislatures in ratifying was questioned.¹² The Supreme Court, however, held that the action of the state legislatures in ratifying was final and that the legislatures were not acting as law-making bodies for the states, but as federal

¹¹ 253 U. S. 211, 1920.

¹² See the pleadings of Mr. Maxwell for the defense, *ibid.*, p. 222.

agencies, and consequently were not bound by the provisions of the constitutions or laws of the various states.

A more vigorous attack on the constitutionality of the federal liquor legislation was made in the case of *Rhode Island v. Palmer*.¹³ In this case it was contended that the procedure in passing the Eighteenth Amendment had been irregular; that the amendment itself was a mere addition and not an amendment, since it was not germane to anything in the original Constitution; that it was violating the Tenth Amendment by taking police power away from the states; and that it was altering the Constitution so fundamentally as to amount to the first step towards its destruction.¹⁴ This plea received but little consideration from the court. It was turned down without any reasons being given, the court merely stating that the Eighteenth Amendment was within the amending power reserved by Article V of the Constitution.¹⁵ A more difficult question presented itself in this case with regard to the interpretation of the Eighteenth Amendment. The Amendment provides that Congress and the several states shall have "concurrent power" to enforce it with appropriate legislation. Did the phrase "concurrent power" mean that there must be joint action between the federal government and the state before the amendment could be enforced in a state? Justice McKenna alone adhered to this view. He insisted that concurrent power could be exercised only by united action and not by separate and independent action. This would mean that the state must

¹³ 253 U. S. 350, 1920.

¹⁴ See the argument for appellant in this case, *ibid.*, 354-381.

¹⁵ In the majority opinion in the case the court stated only ultimate conclusions without an exposition of the reasoning by which such conclusions were reached.

concur before the congressional regulation could take effect in that state. Chief Justice White conceded that this was the meaning conveyed by the wording of the amendment, but insisted that such an interpretation must be rejected as defeating the purpose of the amendment. The majority opinion of the court, written by Justice Van Devanter, was that concurrent power does not necessarily mean joint action and that the federal government can proceed independently of the state in enforcing the liquor law in a state.

The constitutionality of constitutional prohibition cannot be seriously questioned. The incongruity of pleading the unconstitutionality of a constitutional amendment illustrates the futility of attacking federal prohibition on purely legal grounds. The Eighteenth Amendment is a part of the Constitution and congressional enactments defining intoxicating liquor and forbidding its manufacture and sale are certainly in direct conformity with this constitutional provision. The constitutionality of such legislation is therefore obvious. If the taxing clause of the Constitution authorizes Congress to regulate the manufacture of substitutes for butter, as was held in the *McCray Case*,¹⁶ it would be illogical to contend that a constitutional provision which prohibits the manufacture and sale of intoxicating liquor and which empowers Congress to enforce it with appropriate legislation does not authorize Congress to define intoxicating liquor and forbid its manufacture and sale. It is absurd to contend that the constitutional provision is unconstitutional. On the question of the constitutionality of national prohibition there is therefore little to be said.

But the fact that national prohibition is constitutional

¹⁶ See *supra*, Chap. IV.

does not necessarily mean that it is politic and wise. It is possible that when zealots of prohibition took advantage of the heroic impulses of war and consigned the United States to a permanent policy of prohibition they were guilty of committing an irretrievable blunder. It is not necessary to affirm that industry, self restraint, and sobriety are virtues, or that intemperance is harmful to society. These are admitted facts. Nor is it necessary to point out that prohibition, in so far as it encourages sobriety and discourages intemperance, is a wholesome influence. But national prohibition offers a peculiar problem which can not be solved by a consideration of only the economic and moral phases of the liquor question. National prohibition presupposes the possibility of dealing effectively with a question which directly affects the habits of life of millions of people by imposing a uniform and inflexible standard throughout a country of vast area and with a diversified population, such as the United States, without regard for localized opinion. The question, from the standpoint of the student of government, is not whether prohibition is inherently right or inherently wrong, but whether it is politic for the central government to determine the legal status of intoxicating liquor in the several states and local communities. A study of the expanding activities of the federal government would not be complete without giving some attention to this phase of the problem of national prohibition. National prohibition is a tremendous experiment in federal government in the United States and the outcome will indicate the possibilities and limitations of centralized control. It would be presumptuous to attempt to forecast the future of such a policy. We may, however, indicate some of the difficulties attending na-

tional control of the liquor traffic, not with the view of discrediting prohibition, but rather of pointing out the limitations of the central government in sumptuary legislation. These limitations are not constitutional and legal restrictions, but are such as inhere in human nature and organized society.

If wisdom is to prevail in legislation, it means that enactments must be more than merely a formulation of public policy. Prudence dictates that, if the law is to be enforceable, the provisions of a statute must be in accord with public opinion. The ordinary statute does not provoke either popular approval or resentment because generally people are not interested, but prohibition, unfortunately, does not come within this description. Liquor legislation always tends to arouse popular interest. The regulations are ardently championed by some and by others they are condemned with equal ardor. It is futile to hope to enforce such legislation without the support of public opinion. Public opinion, as has been pointed out by Professor Lowell, is not simply the opinion of the majority.¹⁷ It is opinion to which the minority will ungrudgingly yield. The presence of a considerable group of irreconcilables makes public opinion on a question impossible. To enforce the opinion of the majority upon a substantial irreconcilable minority is not government by public opinion, not popular government, but is a tyranny of the majority. If national prohibition will tend to perpetuate a conflict between a relentless majority on one side and a reluctant minority on the other, it cannot hope to succeed in a democracy. The crux of the whole question,

¹⁷ A. L. Lowell, *Public Opinion and Popular Government* (New York, 1913), Chap. I.

therefore, is whether national prohibition has the support of public opinion in the areas where it is to be applied.

It is questionable if the Eighteenth Amendment and subsequent legislation can be considered a true index of public opinion on the liquor question in the United States.¹⁸ During the time when the Eighteenth Amendment was passed and ratified public sentiment was influenced by the war. Prohibition was advanced as a war measure. A vote at such a time may have been untimely and misleading. The fact that many of the states had adopted prohibition at the time when the Amendment was ratified is a better indication of the state of public opinion at the time. But even this may be misleading. This wave may have been temporary and caused by skillful propaganda and management of legislative bodies. It is significant that during the fifties an anti-liquor wave swept the country and the legislatures of some fifteen states adopted prohibition. In every one of these states, where the law was not declared unconstitutional by the courts or vetoed by the governor, it was repealed by subsequent legislatures.¹⁹ Public opinion must be distinguished from a fluctuating popular sentiment which is usually temporary and transient. Public opinion is real opinion. If irrational it must form an integral part of the believers' philosophy. If rational it must be based upon a wide diffusion of facts with

¹⁸ The *Anti-Saloon Year Book* for 1921 shows that the Volstead Act was passed over the President's veto by a vote of 196 to 55 in the House and by a vote of 65 to 20 in the Senate. It also shows that in ratifying the 18th Amendment the total vote of the state legislatures was over 80 per cent dry.

¹⁹ See Ernest H. Cherrington, *The Evolution of Prohibition in the United States of America* (Westerville, 1920), Chap. V.

which the public has become sufficiently familiarized in order to pass judgment. It would be extremely difficult to have a public opinion on the question of intoxicating liquor. Such an opinion would necessarily vary with individuals, localities, occupations, and nationalities. To some prohibition would mean the destruction of the saloon with its attendant evils. To others it would mean governmental interference with the consumption of beer within the family circle. Obviously, under such conditions, there could not be a public opinion on national prohibition until after it had been tried when people might judge by the results. This experiment might have been tried by Congress under its power to regulate interstate commerce or to levy taxes. It could then have been repealed if it were found to be impracticable. In establishing national prohibition by a constitutional amendment prohibitionists sought to make it irrepealable. This shows the lack of proportion characteristic of reformers. National prohibition was still in the experimental stage and the issue was still vague and undefined in the public mind. Under these conditions it was reckless, to say the least, to insert such a provision in the Constitution.

National prohibition attempts to impose uniformity of standards of conduct with regard to consumption of intoxicating liquor. It thus forces localities, and even states, into a federal sumptuary system, regardless of local desires. In this it reveals the dangers attending federal control of matters pertaining to human conduct and habits of life. Habits of life vary in different localities and it is hazardous to attempt to introduce uniformity over a wide area by statutory enactments. It has been urged that at the time of the ratification of the

Eighteenth Amendment eighty-eight per cent of the total area of the United States containing sixty-one per cent of the population had adopted prohibition by popular vote.²⁰ Such figures auger well for federal enforcement. But it is also significant that more than a third of the total population, a large proportion of which lived in fairly contiguous and compact areas, were opposed to prohibition and were coerced into an acceptance of the federal prohibition legislation.²¹

It is characteristic that in legislation pertaining to personal conduct, the wider the area and the more diversified the population coming under the regulation, the less regard will be given to local opinion. This is particularly true of liquor legislation, and the prohibition movement which culminated in the adoption of the Eighteenth Amendment is notable for the constant expansion of the unit areas in which prohibition was established. For some time after its organization, the Anti-saloon League concerned itself mainly with local option.²² Local option was laudable for serving as an

²⁰ *Literary Digest*, LXVIII, pp. 11-12, Jan. 29, 1921. The figures of the Anti-Saloon League are 95.4 per cent and 68.3 per cent respectively.

²¹ The *Literary Digest* for March 27, 1920, in a survey of the attitude of the states at the time when federal constitutional prohibition went into effect, makes the following observations: Massachusetts voted by a large majority in favor of four per cent beer. New Jersey elected a governor on a platform to do everything in his power to nullify the Eighteenth Amendment and this governor later signed a bill providing for 3.50 per cent beer. Rhode Island adopted a four per cent beer measure. Wisconsin fixed the alcoholic content of beer at 2.50 per cent. Ohio defeated at the polls a law to enforce the prohibition provision of the state constitution and disapproved the action of the legislature in ratifying the Eighteenth Amendment. Judges in Kentucky, Louisiana, Missouri, New York and Rhode Island granted injunctions to restrain federal officers from enforcing the prohibition laws.

²² The Anti-Saloon League was organized at Oberlin, Ohio, in 1893, and was originally known as the Ohio Anti-Saloon League. A few months later an organization was established in the District of Colum-

agency for the expression of community opinion. It gave the adherents of both sides of the question an opportunity to express their sentiments. It also had the advantage of serving as a criterion of the enforceability of liquor legislation. If a majority of a community were in favor of prohibition, then prohibition would have a reasonable chance of being enforced in that locality. But some communities remained wet and could not be changed by local option. Such communities would threaten the enforcement of dry laws in localities which had adopted prohibition. If they were to be made dry, outside pressure would have to be applied. For this reason the area covered by the referendum or included in the prohibition legislation was extended so as to include wet communities. The result was county option and state-wide prohibition. National prohibition by constitutional amendment was the final step in this direction. Not until considerable progress had been made in the different states did the Anti-Saloon League formally declare for national prohibition.²³ When national

bia, and in 1895 the national organization of the Anti-Saloon League came into existence at Washington, D. C. Within a few years thereafter branches had been organized in practically every state and territory. To this organization, more than to any other single factor, may credit be given for bringing about national prohibition. Maintaining its national headquarters at Westerville, Ohio, with branch organizations in every state, it has carried on a relentless warfare on the liquor traffic. Profiting by the tactics of the liquor interests, it has stopped at nothing to attain its goal. It has flooded the country with propaganda, maintained lobbies in the legislatures, intimidated office seekers, and forced the liquor issue into elections. It is unquestionably the most powerful extra-governmental institution that has ever appeared in American politics.

²³ This declaration was made in November, 1913. At the next session of Congress Mr. Hobson of Alabama introduced a resolution proposing a constitutional amendment. While the resolution failed of the necessary two-thirds, sentiment had grown so strong in favor of prohibition that the proposal received a majority in the House.

constitutional prohibition went into effect, not only localities, but entire states were included in the prohibition area regardless of public opinion in these states.

This inclusion in the federal sumptuary system of vast areas in which public opinion is opposed to the legislation has revealed the cardinal weakness, not only of national prohibition, but of central regulation in general of matters pertaining to police. It gives public opinion in one section of the country an opportunity to determine the conduct of people living in an entirely different section under different conditions and with different views of propriety. Public opinion on prohibition in Kansas or Texas may determine the status of the liquor traffic in New Jersey or Rhode Island. But while prohibitionists in one section may force dry legislation on anti-prohibitionists in another section, it is extremely difficult to enforce the laws in localities where they are unpopular. Consequently so long as there are localities where the sentiment is against enforcement these areas will always be centers of disturbance. Federal enforcement cannot work smoothly and effectively as long as an adverse public opinion exists in these areas and it is not probable that such localities will soon witness a change of heart. It is notable that when federal constitutional prohibition became effective even state-wide prohibition was in the experimental stage. Only one state had consistently maintained a policy of strict prohibition over

Earlier resolutions had been introduced in Congress. Henry W. Blair of New Hampshire introduced such a resolution in the House in 1876 and again at different times when he served in the Senate. A resolution was also introduced in the Senate in 1885 by Senator Preston B. Plum of Kansas. These early resolutions, however, did not get beyond the introductory and committee stages.

a long period of time.²⁴ In general it might be said that the policies of the states were variable rather than constant. This was probably due to the lack of a fixed and unwavering public opinion on the question in the different states. The states, however, had the advantage of being able to experiment with the problem on a smaller scale and by a process of trial and elimination to arrive at a policy which showed some semblance of complying with public opinion and of meeting with success. Under constitutional prohibition it would be extremely difficult for the federal government to arrive at a workable policy through a process of experimentation. A policy which proved successful in Kansas would not necessarily be suitable for New York. But the Constitution technically is the supreme law of the land and its provisions apply equally in all the states. The Eighteenth Amendment predicates uniformity in all the states on a question where variability may be the best solution.

The history of liquor legislation in the states shows that, whatever method of regulation was attempted by a state, the question could never be finally disposed of. The liquor question was an ever-recurring issue at elections. This undoubtedly was one of the reasons for shifting the burden from the states to the federal government. But the fact that the question could not be finally settled in the states does not presage a happy solution by the federal government where, on account of a broader area and a more diversified population, the

²⁴ Kansas has maintained a policy of strict prohibition since the adoption of a constitutional amendment in 1880. Other pioneer prohibition states have wavered somewhat in their policies regarding the legal status of intoxicating liquors, prohibition, and enforcement. For a summary of state liquor legislation, see the *Anti-Saloon League Year Book* for 1921, pp. 136-324.

difficulty is accentuated rather than diminished. It is significant that in 1920 the conventions of both the major parties evaded the issue when they were confronted with the question. The fact that public opinion had not been definitely formulated on the question made it hazardous for a political party to commit itself on the issue of prohibition enforcement. Whenever state political conventions are held the liquor question is a disturbing factor. In the congressional campaign of 1922 the question was present to the confusion of issues and the discomfiture of candidates. How long prohibition will remain a political issue no one can say. The history of prohibition in states, like Maine and Kansas, where the issue persistently injected itself into politics, furnishes little consolation. This, however, must be admitted, that so long as the liquor question is injected into politics it will tend to obscure the real issues and demoralize national politics as the politics in the states have been demoralized by it. The words of President Harding, in his message delivered to Congress on December 8, 1922, are significant:

Most of our people assumed that the adoption of the eighteenth amendment meant the elimination of the question from our politics. On the contrary, it has been so intensified as an issue that many voters are disposed to make all political decisions with reference to this single question. It is distracting the public mind and prejudicing the judgment of the electorate.

On account of the varying attitudes on the liquor question in different sections of the United States, national politics is even more subject to demoralization because of this issue than the politics in the states have been. Enforcement from Washington is bound to be

irritating in those localities where public sentiment is against prohibition. In other sections where the sentiment is in favor of prohibition a relentless enforcement by the federal authorities will be viewed with popular approval. This offers an opportunity for the federal officials to make political capital for their respective parties by making the enforcement either rigorous or lax in order to influence elections. It is not inconceivable that a party in control of the national government in order to strengthen its tenure will attempt to win favor in different sections by a manipulation of the administrative machinery for the enforcement of liquor laws. It is not only conceivable, but probable, that federal agents in the different states will be sorely tempted by local political influences and that candidates for both federal and state offices will be catechized by an inquisitorial constituency regarding their position on the question of strict or lax enforcement of existing liquor legislation. The demoralizing effect of this is obvious. The other issues in a political campaign will be confused and obscured by the liquor question. The constructive statesman will hesitate to enter such a contest and will be replaced either by the fanatical reformer who is blind to all issues save one or by the unprincipled politician who is willing to prostitute what little convictions he may have in order to gain favor in the eyes of an active, relentless, political minority.

People living under self government are reluctant to abandon the illusion that human nature can be changed by legislative enactment. When society is confronted with practices which are deemed injurious, but which may be the result of inherent weaknesses in society, the popular verdict is always, "There ought to be a law

against it." Too often the question of whether such a law could be successfully enforced is not taken into consideration. A law which cannot be enforced is likely to do more harm than good, regardless of the lofty purposes which actuated the legislators in enacting it. It creates a condition where the law declares one thing and the facts show another. Under such conditions, violations of laws become commonplace. People witness such violations and condone them. A person is not restrained by the consciousness that if he violates such a law he will be scorned by his associates. This makes infractions easier, since the probability of forfeiture of social esteem is a greater restraining influence to most individuals than is the fear of statutory penalties. The result is that a law which cannot be enforced, which is not popularly approved, often becomes a dead letter on the statute books. If this were the only result, unenforceable legislation might be tolerated as a harmless official expression of unattainable ideals. But people cannot continue to condone the violation of a law without developing a spirit of disrespect for the authority which seeks to enforce it. There will thus be a loss of that deferential regard for law and government which is essential to the very existence of a democracy. There is a solemn warning in the words of President Harding: "Let men who are rending the moral fiber of the republic through easy contempt for the prohibition law, because they think it restricts their personal liberty, remember that they set the example and breed a contempt for law which will ultimately destroy the republic."²⁵ But exhortations to refrain from violating the law because of the evil consequences of infractions help little

²⁵ Message, December 8, 1922, *Chicago Tribune*, Dec. 9, 1922.

if the legislation, due to an adverse public opinion, is unenforceable. There is also the danger that, if the ideal is too far in advance of the actual, people are liable to despair of its realization. If the odds are too great against the enforcement of the law, the administrative official is apt to become discouraged and accept halfway measures as the inevitable alternative to a real enforcement, and negligence in the enforcement of one law does not promote alertness in the enforcement of other laws.

Can a uniform standard with regard to the liquor traffic be made to apply successfully throughout the United States with its wide span of territory, its assortment of nationalities, its variety of industries and interests? In other words, can national prohibition be successfully enforced? This is the crucial question which future events alone can answer. If it can be enforced there is some hope of ultimately disposing of a question which has been a disrupting influence in our political life. If it can not be enforced the difficulties will be aggravated rather than diminished and the attempted remedy more dangerous than the evil which it seeks to correct. On the stationery of the Anti-Saloon League of New York is printed in flaming letters the slogan, "The prohibition law must be enforced, not because it is prohibition, but because it is law." Like most epigrams, this is only partly true. If conditions are such that it is impossible from the very nature of things to enforce the law, then little is gained by such exhortations. Under such conditions the law should either be repealed or modified to suit existing conditions. Prohibition laws, by their very nature, are difficult to enforce. In prohibiting the liquor traffic, the manufacture and sale of intoxicating liquor

are taken out of the hands of law-abiding citizens who are accustomed to submit to legal regulations and placed in the hands of criminals who seek their fortunes by violating the law. If public opinion in a community is in favor of strict enforcement, violators will be severely dealt with and the illegal traffic may be rendered extremely difficult. On the other hand, if a whole community is opposed to enforcement, if the majority of the people in a section feel that such legislation is an unwarranted interference with their habits of life, then effective enforcement is rendered practically impossible. To assign the task of enforcing prohibition to the national government may be to saddle that government with a greater burden than it can carry. The notable efficiency of the federal government in the past, as contrasted with that of the states, has inspired us with confidence in that government. To ascribe inordinate powers to the federal government may lead us to entertain false hopes. Our experience with federal enforcement has added significance to the statement made by Chief Justice Taft in 1918 when, in a communication regarding the advisability of federal constitutional prohibition, he said, "The theory that the national government can enforce any law will yield to the stubborn circumstances, and a federal law will become as much a subject of contempt and ridicule in some parts of the nation as laws of this kind have been in some states."²⁶

Even some of the most ardent advocates of national prohibition are convinced that the federal government cannot successfully enforce prohibition without the

²⁶ W. H. Taft, Letter published in the *New Haven Journal-Courier*, Sept. 7, 1918, reprinted in *U. S. Brewers Assn. Year Book*, 1918, p. 25.

coöperation of the states.²⁷ They argue that the Eighteenth Amendment imposes the same duty upon the states as upon Congress.²⁸ But it must be remembered that prohibition is a growth rather than a status fixed by legislative enactment. This was true in the states which adopted and maintained a consistent policy of prohibition prior to the adoption of the Eighteenth Amendment. The mere fact that the Constitution technically imposes a duty upon the states will not *ipso facto* cause a state to assume the responsibility of enforcement unless public opinion in the state is in accord with the constitutional provision. The Fifteenth Amendment has certainly not enfranchised the negroes in the South. It has merely caused the southern states to enact legal subterfuges for evading constitutional requirements. The Eighteenth Amendment gives the states "concurrent power" to carry out its provisions. But authorities may be cited to show that there is no way for the federal government to compel state officials to aid in the enforcement of federal statutes.²⁹ Whether or not the states will coöperate with supplementary regulations rests with the state legislatures. When the Volstead Act was passed a number of the states were ready to coöperate with the federal government.³⁰ Since then nearly all

²⁷ See statement of W. B. Wheeler, National Attorney and General Counsel of the Anti-Saloon League of America, in *Current Opinion*, LXX, pp. 35-8, January, 1921.

²⁸ *Ibid.*

²⁹ *Prigg v. Commonwealth*, 1842, 16 Peters 539, at 615-616; Westel W. Willoughby, *The Constitutional Law of the United States* (2 vols., New York, 1910) I, p. 92 (footnote). In *Holmgren v. United States*, 1910, 217 U. S. 509, at 516, the court said, "Unless prohibited by state legislation, state courts and magistrates may exercise the powers conferred by Congress under such laws."

³⁰ When national prohibition became operative the following states had already defined intoxicating liquor as liquor of more than one-half

of the states have enacted state enforcement laws corresponding in their general provisions to the federal legislation.

The friends of constitutional prohibition have repeatedly asserted that without the coöperation of the states, strict enforcement is likely to prove a failure. These assertions are significant because recently in several states there seems to be a protest against the state co-operating with the federal government in the enforcement of national prohibition. In some quarters there is a spirit of revolt against enforcement. The Governor of Maryland has recently been quoted as boasting that his state has never passed an enforcement law. During the present session (1923) of the legislature of New York the enforcement law of that state was repealed. Formidable attempts to repeal enforcement laws have been made in the legislatures of other states. After signing the repealer in New York, the Governor gave out a lengthy statement intended to justify his stand. His action aroused interest throughout the country and was loudly acclaimed and condemned in other states. If other states, where prohibition is unpopular locally, follow the lead of New York and Maryland, it will mean that the Eighteenth Amendment will have a questionable future throughout large areas where technically it is the supreme law of the land. What will be the outcome of this? Will it mean that the federal government

of one per cent alcoholic content: California, Statutes of 1919, p. 93, Chap. 61; Delaware, Laws of 1919, p. 635, chap. 239; Florida, laws of 1918, p. 36, chap. 7736; Illinois, laws of 1919, p. 931; Indiana, acts of 1917, p. 15, chap. 5; Minnesota, laws of 1919, p. 537, chap. 455; Missouri, laws of 1919, p. 414; Nevada, statutes of 1919, p. 1; Ohio, laws of 1919, p. 720; Virginia, acts of Assembly, 1918, p. 578, chap. 388. The author is indebted to Miss Eda Tanke, of the Wisconsin Legislative Reference Library, for these citations.

will have to tolerate additional violations of the Constitution in areas where the Eighteenth Amendment is unpopular locally? This has been the fate of the Fifteenth Amendment in the South. One portion of the Constitution is not likely to be considered more sacred than another if it conflicts with local interests and desires. It is not inconceivable that eventually the Eighteenth Amendment will be a dead letter in areas where regional public opinion is opposed to enforcement.

National prohibition has a good chance to succeed if the state enforcement laws are conscientiously carried out. The federal government, through its liquor legislation, sets up a standard for the states and by exerting a pressure from without may prompt them to greater endeavors. This may stabilize the states in their policies towards the liquor question until prohibition has become more popular and better established. There is a danger, however, that, if state enactments result from federal pressure rather than from a popular demand within the state, the laws will not be energetically enforced. If prohibition is unpopular in a locality, if enforcement is irritating and does not win public approval, if the public is indifferent, the state official is apt to leave the burden of enforcement with the federal agent. Under such conditions enforcement by any authority is rendered extremely difficult and the federal officer is apt to find himself in the embarrassing position of being unable to enforce federal law for lack of coöperation by the state and local officials. National prohibition has established an anomalous relationship between the federal government and the states. In the enforcement of its other regulations such as those pertaining to the mails, currency, and collection of revenues the national govern-

ment has been self-sustaining and its work has been performed with admirable efficiency. To have to be re-enforced by state and local officials in the enforcement of national prohibition does not increase that respect for the national government which in the past it has commanded in the states and local communities.

National prohibition can succeed only to the extent that it wins the approval of public opinion in different localities throughout the United States. This is destined, in all probability, to be a slow process. It is notorious that in some sections of the United States, where the collection of internal revenues on distilled liquors has been viewed by local opinion as an infringement of personal freedom, the federal revenue officials have been resisted for generations. There is a possibility that a policy of strict enforcement may eventually win local public opinion over to favor national prohibition. But if large, populous sections of the country are opposed to strict enforcement, if there is a smoldering spirit of resentment against prohibition, there is danger of the law becoming subject to ridicule and contempt. If such a condition persists and the law cannot modify public opinion, it may be politic to modify the law so as to make it more amenable to regional opinion. The present state of public opinion on national prohibition seems to indicate that a modification is not only probable but desirable.³¹ Such a modification may be accomplished in two ways. It may be accomplished by a repeal of the Eighteenth Amendment. Due to the inflexibility of the

³¹ The poll of nearly a million votes recently conducted by the *Literary Digest* shows that 40.8 per cent of the votes favored modification of the Volstead Law; 38.6 per cent favored strict enforcement of the Volstead Law; 20.6 per cent favored a repeal of the 18th Amendment. See *Literary Digest*, September 9, 1922, p. 11.

amending process such a repeal is not within the range of present possibilities. A single branch of the legislature in thirteen of even the least populous states could forestall this action. It is also questionable whether public opinion throughout the United States would favor a repeal.³² The other method of modifying the existing law is by congressional action. The term "intoxicating liquors," as used in the Amendment, is a relative term. By the provisions of the existing legislation to enforce the Eighteenth Amendment, Congress has defined intoxicating liquor as any beverage of more than one-half of one per cent alcoholic content.³³ This legislation and prior administrative rulings, however, would probably not, in the eyes of the courts, be construed as a binding precedent which would prevent Congress from giving a more liberal interpretation to the constitutional amendment. What constitutes intoxicating liquor is a question of fact and considerable range is given to legislative discretion in such matters. Congress therefore could probably define intoxicating liquor so as to permit the manufacture and sale of light beer and wines without violating the Constitution. Such legislation would not deprive the prohibition states of the powers, which they had prior to the adoption of the Eighteenth Amendment and which they still have, of making their own liquor regulations more stringent than those of the federal government. As in the case of the Volstead Act, it would also prevent the states from attempting a more liberal interpretation of the amendment

³² In the *Literary Digest* poll, out of 922,388 votes cast, only 189,856, or 20.6 per cent, voted to repeal the amendment. *Ibid.*

³³ This definition was probably suggested from administrative rulings of the Treasury Department in classifying liquors for revenue purposes.

than that given by Congress. A liberal interpretation by Congress would give the states a certain leeway, and, within prescribed limits, they could make regulations which would be more in conformity with local opinion than is the present legislation. Such a compromise between local autonomy and central control may be the only feasible solution to the difficult problem of national constitutional prohibition.

It is the opinion of the author that the Eighteenth Amendment was both untimely and unwise. This view is not based on the assumption that prohibition is an illegal interference with personal liberty. The right to engage freely in the liquor traffic has never been a constitutional right in the United States. It has always been subject to governmental regulation and might be said to have existed through the sufferance of the government. Nor does a person have an inherent or constitutional right to buy and consume intoxicants. It is not only legal, but reasonable, that the moderate user should be compelled to forego a personal pleasure in order to save society from the damage that might result from an immoderate use of intoxicating liquor. The view that the Eighteenth Amendment was unwise is not based on the theory that all prohibition is wrong. Undoubtedly self-restraint, improved social standards, criticism, and restrictions imposed by employers have done more to moderate the evils of intemperance than have legislative enactments. But this does not preclude the community from imposing additional restrictions, and if these restrictions have the backing of public opinion in the community it is wise to impose them. National constitutional prohibition, however, introduces a new and more difficult problem. The area of the United States

is so extensive, the interests and habits of life of the people so varied, public opinion on the question of intoxicating liquor so unsettled, that it is practically impossible to impose a uniform standard and effectively enforce it. State governments could experiment and adjust their liquor regulations to fit the demands of local opinion. National constitutional prohibition denotes a uniform standard for all sections of the country regardless of local opinion. A too rigid standard cannot be imposed without causing popular resentment, political demoralization, and a disrespect for law. If this should be the result of national prohibition, and the present indications are that it is the result in many sections of the United States, then it is questionable if the remedy is not more dangerous than the evil which it purports to correct.

The Eighteenth Amendment should serve as an object lesson in the study of our constitutional system. It is the first and only constitutional provision which expressly confers a police power upon the federal government and charges Congress with the duty of legislating for the betterment of public health, safety, and morals. While it is the only constitutional provision that expressly vests such power in Congress, it is by no means the only one that has been suggested. Advocates of child labor legislation, education, public health legislation, Sunday closing laws, labor legislation — to mention only a few of the reforms suggested — have all sought to have the Constitution amended so as to make the national government sponsor for their respective reforms. Movements for such constitutional amendments are part of the general tendency to transfer to the federal government those functions which have not been successfully

performed by the states. Too often reformers fail to consider that the main reason why these functions have not been successfully performed by the states is that they are extremely difficult problems to cope with. To transfer them to the federal government which is already overburdened may retard rather than promote real progress.

The amending process has a mischievous feature in that it tends to diffuse responsibility. Congress may propose an amendment with the feeling that the ratification by the state legislatures will serve as a referendum to justify the congressional action.³⁴ The responsibility is thus transferred to the state legislatures. Then a state legislature may feel that it is only one of the thirty-six other similar bodies whose ratification is necessary and consequently not give the resolution the thought which it would receive if the action of this particular legislature were final. The man in the street approves the principle of morals legislation without conceiving the technical difficulties. For this reason the legislator may be intimidated into voting for the proposal under penalty of being proclaimed as opposed to the principle of the reform. In this situation the legislator, even though he may feel that this method of attaining the reform is unwise, may be led to vote for the measure with the feeling that after all his vote is only one of many, and his legislative chamber only one of many. This diffusion of responsibility makes it possible for an ardent and persistent organization of reformers to attack at strategic

³⁴ It is interesting to note that during the debate in the House on the Eighteenth Amendment it was frequently emphasized that in adopting the resolution for the amendment, Congress was not enacting prohibition legislation but was merely making provisions for a referendum on the question. See *Cong. Rec.* for Dec. 17, 1917.

points and eventually to change the Constitution and to charge the federal government with the duty of carrying out their reforms. To make such additions as the Eighteenth Amendment to the Constitution is hazardous. A great deal of evil as well as good may be realized by changing the Constitution from an admirably brief statement of organic law, which defines the organization of the government and prescribes its powers and limitations, into a compilation of statute laws which is difficult to alter even when changes are desirable.

No serious-minded person will deny that sobriety and temperance are virtues which should be encouraged. The only controversial question is with regard to method. Which method, national prohibition or state prohibition, will produce the least amount of violations? Which will tend to reduce the possibility of majority tyranny, with its attendant sectional resentment and encouragement of defiance of law? Under which may public opinion find an opportunity to express itself and assist in enforcement? These are questions which must be considered. Prohibition is a laudable reform if it prohibits. Under which system is it more apt to prohibit? But prohibition is only one reform. Too great a price may be paid in attempting to realize it on a national scale by an attempted arbitrary enforcement of a constitutional amendment. Prohibition is not the result of legislative enactment. If really effective it must be a condition resulting from a long period of development during which it has had a chance to take root in the public conscience. Such has been the case with Kansas where prohibition legislation goes back to territorial days and where constitutional prohibition has been in force for over forty years. Such an evolution was taking place on a national scale

prior to the adoption of the Eighteenth Amendment. The Eighteenth Amendment was the result of this development but it apparently was abortive. It was adopted when public opinion in some sections was still opposed to prohibition. Prior to the enactment of national prohibition there seemed to be a steady growth of public opinion in favor of prohibiting the liquor traffic. This development was gradually breaking down localized opinion in the sections opposed to it. Had this continued a situation might have evolved in which enforcement would have become effective and imperative because the public demanded it. National prohibition seems to have retarded, rather than enhanced, this development by antagonizing local opinion and thus making enforcement difficult if not futile. It is to be hoped that the difficulties can be overcome. But whatever the outcome, national prohibition has furnished a lesson in federal government. That lesson is that it is hazardous to bring large areas into a centralized sumptuary system without due regard for localized opinion.

PART III
ECONOMIC LEGISLATION

CHAPTER XII

ECONOMIC LEGISLATION — HISTORY AND METHODS

It is impossible in a single volume to give an adequate consideration to such large and intricate subjects as railroads, trusts, corporations, and labor. However, it should be noted that whatever legislation has been enacted by Congress affecting these subjects has received its constitutional authorization mainly from the commerce clause. Through its power to regulate interstate commerce, Congress has minutely regulated the railroads of the country, prohibiting disapproved practices, fixing rates, prescribing safety appliances, and regulating conditions of labor employed in interstate commerce. Congress has made it criminal to enter into certain commercial agreements. Corporations have been protected in their interstate trade from adverse state laws. The activities of labor organizations have been restricted by federal legislation. Such legislation has extended the power of the federal government into the province of the states, and this federal expansion has necessarily had a more or less restraining influence on the power of the states over these subjects.

The aggressive policy of the federal government towards the railroads and trade combinations is a comparatively recent development and has resulted from the complexities of modern commerce and industry. The framers of the Constitution could have had no concept of the magnitude of modern business organization. Mr.

Watson, in his work on the Constitution, states that "during the Colonial period but six business corporations were chartered, but in the thirteen years under the Articles of Confederation the number increased to between twenty and thirty. Of these one was incorporated by New York, two by Maryland, three by South Carolina, nine by Massachusetts, six by Virginia, and four by Pennsylvania."¹

When the Constitution was framed and ratified it was still the practice in some countries to charter great trading companies and grant them practically a monopoly of foreign trade in certain regions. This practice had, however, fallen into disrepute in most countries. The idea of monopoly was also contrary to the individualistic philosophy of the colonists. This might account for the attitude in the Constitutional Convention which was hostile towards monopolies. On September 14, four days before the convention adjourned, Doctor Franklin made a motion to give Congress power "to provide for cutting canals where deemed necessary."² Mr. Madison suggested an enlargement of this motion into a power "to grant charters of incorporation where the interests of the United States might require, and the legislative provisions of individual States may be incompetent."³ This aroused opposition in the convention. Mr. King was afraid such a provision would prejudice the states against the Constitution because it would be referred to banks in some sections of the country where the establishment of banks had been a subject of contention and in other places it would be referred to mercantile monop-

¹ David K. Watson, *The Constitution of the United States* (2 vols., Chicago, 1910), I, p. 572.

² *Madison Papers*, III, p. 1576.

³ *Ibid.*

olies.⁴ Colonel Mason was for limiting the motion to canals because he "was afraid of monopolies of every sort."⁵ Mr. Wilson, who favored giving Congress this power, did not think banks would arouse opposition in the states, and concluded that, "As to mercantile monopolies, they are already included in the power to regulate trade."⁶ Doctor Franklin's motion was then modified to limit it to canals and was lost, only three states favoring it.⁷

This same apprehension towards monopolies is evidenced in the ratifying conventions of the states. Among the amendments suggested by the Massachusetts Convention is found one providing "that Congress erect no company of merchants with exclusive advantages of commerce."⁸ Several other states suggested the same amendment. Unsuccessful attempts were also made during the first session of Congress to secure such an amendment and in 1793 the attempt was renewed in the Senate, but this also failed.⁹

Aside from the fear of monopolies there appears to have been no apprehension regarding the federal power to regulate commerce. Commerce among the states in 1787 was a simple thing, being carried on in teams and wagons and by sailing vessels and small river craft. The regulation of interstate commerce was therefore regarded by Mr. Madison as being essentially supplemental to the control over foreign commerce and as being

⁴ *Madison Papers*, III, p. 1576.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Supplement to the *Journal of the Federal Convention*, p. 403.

⁹ Herman V. Ames, *The Proposed Amendments to the Constitution of the United States during the first Century of its History* (Washington, 1897), p. 255.

granted to make the control over foreign commerce effective.¹⁰ Mr. Judson, in his treatise on interstate commerce, describes the early attitude towards the power of Congress to regulate commerce as follows: "The far-reaching importance of this federal control over commerce among the states was not and could not be foreseen. It only came to be realized in the course of years, as the commercial development of the country demanded a judicial construction of the federal power in harmony with the requirements of such commerce. The basis of this construction for all time was made by the far-sighted and masterful reasoning in the broad and comprehensive opinions of Chief Justice Marshall."¹¹

That the constitutional power granted to the federal government by the commerce clause was not frequently employed during our early history is indicated by the fact that it was not until 1824 that a case involving the construction of this clause was submitted to the Supreme Court of the United States. This was the famous case of *Gibbons v. Ogden*.¹² The first case involving the question of regulation of foreign commerce was not submitted to the Supreme Court until 1827.¹³ In Prentice and Egan's treatise on the commerce clause it is observed that "before the year 1840 the construction of this clause had been involved in but five cases submitted to the Supreme Court of the United States. In 1860 the number of cases in that court involving its construction had increased to twenty; in 1870 the number was thirty; by 1880 the number had increased to seventy-seven; in

¹⁰ *The Federalist*, No. 42, ed. by P. L. Ford, pp. 275-276.

¹¹ Frederick N. Judson, *The Law of Interstate Commerce* (3d ed., Chicago, 1916), p. 5.

¹² 9 Wheaton 1.

¹³ *Brown v. Maryland*. 12 Wheaton, 419.

1890 it was one hundred and fifty-eight; while at present (1898) it is not less than two hundred and thirteen. In the state courts and United States Circuit and District courts the progress is not less significant. In 1840 this clause of the Constitution had been involved in those courts in fifty-eight cases only. In 1860 the number had increased to one hundred and sixty-four; in 1870 it was two hundred and thirty-eight; in 1880 it was four hundred and ninety-four; in 1890 it was eight hundred, while at the present time (1898) it is nearly fourteen hundred.”¹⁴ Another writer, in 1910, notes that, “So rapid has been the development of this clause and so extensive have its powers grown that fully two thousand cases involving the construction of this language have reached the courts of last resort in the States and the Supreme Court of the United States.”¹⁵ This increase in the number of cases involving the question of interstate commerce might be taken as an index to commercial expansion in the United States. An increasing commerce called for more governmental regulation and brought about more friction.

Until the latter part of the nineteenth century the federal government did not assume a positive attitude towards business organizations. Navigation had been subject to congressional regulation since the establishment of the federal government; but until the Interstate Commerce Act of 1887 the regulation by Congress of navigation was not extended, except in a few cases, to anything except the means and instrumentalities of transportation. Prior to 1887 Congress had done very little

¹⁴ E. Parmalee Prentice and John G. Egan, *The Commerce Clause of the Federal Constitution* (Chicago, 1898), p. 14.

¹⁵ David K. Watson, *The Constitution of the United States*, I, p. 453.

to regulate transportation by land. Prior to the enactment of the Sherman Act, in 1890, Congress had done practically nothing to prevent business combinations. To use the language of Professor Willoughby: "Until 1887 the Constitutional power granted the Federal government by the commerce clause was employed by that government only by way of preventing the exercise of unconstitutional powers by the States."¹⁶

The act of 1887 creating the Interstate Commerce Commission and the Sherman Anti-Trust Law of 1890 marked a distinct change towards a positive policy of governmental regulation. Because of the numerous ramifications of modern commerce, these acts were far-reaching in their application. The states, in the exercise of their police powers, had made regulations governing common carriers and passed laws prohibiting conspiracies. The federal government, through its power to regulate interstate commerce, now also entered this field, and in its desire to protect and preserve the business welfare of the community it has exercised powers undreamed of by the framers of the Constitution. The Supreme Court, however, has taken the liberal view that "The reasons which may have caused the framers of the Constitution to repose power to regulate interstate commerce in Congress do not affect or limit the extent of the power itself."¹⁷ The attitude of the court is well stated in the Debs case as follows: "Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today

¹⁶ Westel W. Willoughby, *The Constitutional Law of the United States* (2 vols., New York, 1910), II, p. 734.

¹⁷ *Addyston Pipe and Steel Co. v. United States*, 1899, 175 U. S. 211.

as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, — the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.¹⁸

In its efforts to promote business welfare, then, Congress has not been thwarted by a strict constructionist judiciary. It has enjoyed freedom, and the national government has been permitted to reach over and regulate practices which formerly were left entirely to the states. How far-reaching this control has become is well expressed by one writer who says, "The government today is a silent partner in every large business."¹⁹

For purposes of classification, the methods employed by the federal government in regulating business organizations may be grouped into five different kinds of governmental regulation. It might also be said that, to a certain extent, these different kinds of governmental regulation correspond to the varying attitudes of public opinion towards business organizations.

(1) Prior to 1887 the policy, as has been observed, was mainly that of *laissez faire*. Congress exercised its powers over commerce chiefly for the purpose of encouraging shipping and navigation. The development of harbors, coast surveys,

¹⁸ *In re Debs*, 1895. 158 U. S. 564, at 591.

¹⁹ James T. Young, *The New American Government and Its Work* (N. Y., 1915), p. 119.

etc., was controlled in detail, but transportation by land was given little attention. The attitude of the national government towards interstate commerce was rather negative, the power to regulate being exercised mainly to keep the states within their constitutional limitations.

(2) During the eighties the growing power of the railroads began to be felt and public opinion, first finding expression in agrarian movements and later becoming general, was arrayed against the abuses of the railroads. In 1886 the Supreme Court held that interstate railway transportation was beyond state control.²⁰ By judicial declaration, then, the federal government alone could regulate interstate railway transportation. The following year the Interstate Commerce Act was passed. It is interesting to observe that at this stage the regulation took the form of correcting abuses rather than of restricting business combinations. Section 2 of the Interstate Commerce Act defines and prohibits unjust discriminations in charges and is aimed at such abuses as special rates, rebates, etc. Sections 3 and 4 prohibit undue or unreasonable preferences or advantages with respect to shippers or localities, or in connection with long and short hauls. Only one section, Section 5, which forbids the pooling of freight and division of earnings, is in the nature of an anti-trust regulation.²¹

(3) Following the enactment of the Interstate Commerce Law popular disapproval of large business organizations continued. It was felt that prohibition of abuses was not sufficient, and that large business combinations were evils in themselves. Consequently the Sherman Anti-Trust Law was passed in 1890. The aim of this legislation was to do away with certain kinds of business combinations. Section 1 of the Sherman Law provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with for-

²⁰ *Wabash Ry. Co. v. Illinois*, 1886. 118 U. S. 557.

²¹ For the provisions of the original Interstate Commerce Act, see 24 Stat. at L. 379.

eign nations, is hereby declared illegal.”²² This law, then, declares illegal any combination in restraint of trade or commerce among the several states. The Sherman Law, however, has been general, vague, and difficult to apply. Perhaps no more difficult problem has been presented to the courts than the meaning and application of the Sherman Anti-Trust Law. Suffice it to say at this point that this law has not accomplished what it was intended to accomplish, namely, the abolition of trusts and monopolies. It has, however, by its very vagueness, given the federal government a supervisory position over every large business regardless of its nature or location.

(4) The Interstate Commerce Act and the Sherman Anti-trust Act were partly successful in discouraging the cruder forms of discrimination, but they failed in establishing free and open competition. During the next stage of regulation it was felt that the evils of the trust or combination did not consist entirely in unfair discriminations against itself. During the era of prosperity following the Spanish-American War a large number of business combinations had developed and in many of these the practice of stock watering was flagrant. Accordingly in 1903 the Department of Commerce and Labor was created, one of the chief features of which was the Bureau of Corporations under the direction of a Commissioner. The Commissioner of Corporations was empowered to secure information for the benefit of the President who might make it public. It was hoped in this manner to secure reliable information in dealing with a difficult problem and to discourage disapproved practices by using the weapon of publicity.

(5) Finally, in the fifth stage of regulation, large business organizations have become recognized as a natural commercial development. There has never been a frank abandonment of earlier views, but control rather than abolition has become the policy of regulation. In the exercise of this control, expert serv-

²² 26 Stat. at L. 209.

ice is being employed, and there is a substitution of administrative regulation for legislative control. The creation in 1914 of the Federal Trade Commission, an administrative body with large powers, shows this tendency.²³ The Clayton Act of 1914 shows a similar tendency. Its object is mainly to supplement the Sherman Law by strengthening the legal position of the injured party seeking redress under the anti-trust laws, and to define more clearly certain abuses. One of its avowed objects was to protect organized labor against the operation of anti-trust laws but this was not clearly stated. It attempts to fix liability upon the directors of the offending corporations, but this feature has not been enforced. The strongest feature of the Clayton law is probably that it operates in conjunction with the Federal Trade Commission.²⁴

It should be noted that whatever method has been employed by the federal government, and to whatever extent it has attempted to regulate transportation and business organization, it has invaded more or less the province of the states. Governmental regulation of common carriers is not a recent development. Legal rules describing the privileges and liabilities of common carriers form a substantial portion of the common law. Conspiracies and fraud also were defined and prohibited by the common law. These common law principles were carried over to the Colonies and were enforced by the states before the national government was created. They are still in force in the states, but the central government, through its power to regulate commerce, has assumed an increasing control.

²³ For the Act creating this commission, see 38 Stat. at L. 717.

²⁴ For the Clayton Act, see 38 Stat. at L. 730.

CHAPTER XIII

REGULATION OF TRANSPORTATION

THE extent to which the federal government has assumed control over the means and instrumentalities of transportation has differed materially with respect to transportation by water and transportation by land. With reference to transportation by land there has been an attempt to draw a line of demarcation between interstate and intrastate commerce. Such a line, if it exists at all with regard to transportation by water, is vague and indefinite. To use the language of Professor Goodnow: "In a word, there is no distinction between intrastate and interstate navigation. All navigation is subject to the regulation of Congress."¹

Constitutional reasons may be found for a greater assumption of power by the federal government with regard to transportation by water than by land. Art. I, Sec. 8, clause 10 of the Constitution gives Congress power "to define and punish piracies and felonies committed on the high seas," and Art. III, Sec. 2 provides that the judicial power of the United States "shall extend . . . to all cases of admiralty and maritime jurisdiction." Obviously, the former clause merely gives Congress power to define and punish certain crimes. It is questionable whether the latter clause has added much to the power of Congress to regulate transportation by water.

¹ Frank J. Goodnow, *Social Reform and the Constitution* (N. Y., 1911), p. 46.

The earlier interpretations of the Constitution apparently took the view that the commerce clause was more sweeping in its application with regard to transportation by water than was the provision defining the admiralty and maritime jurisdiction of the federal courts. In his message to Congress, May 4, 1822, President Monroe discussed the power of the federal government to authorize improvements and alterations in navigable waters.² He did not consider the clause dealing with the admiralty and maritime jurisdiction of the courts, but mentioned the commerce clause as one of the provisions of the Constitution from which the federal government derived such a power.³ The early view of the Supreme Court also appears to have been that the source of the congressional power to regulate navigation was the commerce clause. Such apparently was the view of Chief Justice Marshall. Speaking of foreign and interstate navigation in *Gibbons v. Ogden*, he said, "It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged powers, that, for example, of regulating commerce within the state. If Congress license vessels to sail from one port to another in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no

² *Annals of Congress*, Vol. 39, p. 1809.

³ The other provisions mentioned by Monroe were the powers to establish post offices and post roads; to declare war; to pay the debts and provide for the common defense and welfare of the United States; to make all laws necessary and proper for carrying into execution the constitutional powers of the national government; and to make needful rules and regulations respecting the territory and other property of the United States, *ibid.*, pp. 1826-7.

claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police.”⁴ In *United States v. Coombs*⁵ the court held that, under the grant of power to regulate commerce, Congress had power to pass a law punishing theft of goods belonging to vessels in distress though the act was committed above high-water mark. In this case the court said, “The power to regulate commerce includes the power to regulate navigation, as connected with the commerce of foreign nations, and among the states.”⁶

Commenting upon this attitude of the Supreme Court, Professor Goodnow says, “The derivation of the power to regulate navigation from the commerce clause rather than from the admiralty clause was probably due to the feeling that a wider power would thus be secured to Congress.”⁷ In the case of the *Thomas Jefferson*⁸ the rule was laid down that admiralty jurisdiction was limited to waters affected by the ebb and flow of the tide. This would necessarily limit the powers derived from the admiralty clause, and consequently regulations governing navigation were justified as an exercise of powers derived from the commerce clause. As late as 1868 the Supreme Court, upholding as constitutional an act of Congress dealing with the conveyancing of vessels licensed by the United States, said, “Congress having created, as it were, this species of property and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that

⁴ 9 Wheat. 1, at 36. 1824.

⁵ 12 Peters 72. 1838.

⁶ *Ibid.*, at 78.

⁷ *Social Reform and the Constitution*, p. 48.

⁸ 10 Wheaton, 428. 1825.

this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction.”⁹ In *Patterson v. the Bark Endora*¹⁰ an Act of Congress prescribing the methods of employing seamen was referred to as a regulation of commerce.

From the middle of the last century, however, there has been a tendency to consider the power of the national government over navigation to have been derived from the admiralty clause rather than from the commerce clause. In the *Propeller Genesee Chief v. Fitzhugh*¹¹ the earlier view regarding navigable waters was abandoned and it was held that the admiralty jurisdiction of the United States extends to the navigable lakes and rivers of the United States and that Congress has power to make regulations governing navigation on the lakes, not as regulations of commerce, but under the provisions of the Constitution defining the admiralty and maritime jurisdiction of the federal courts. This principle was later affirmed in the *Steamboat Magnolia*¹² and in the *Hine v. Trevor*.¹³ In the *Robert W. Parsons*¹⁴ it was held that the admiralty jurisdiction extended to artificial waters, such as the Erie Canal, lying wholly within the jurisdiction of a state, but connecting with other waterways. Such a liberal construction of the maritime power would lead the government to invoke that power rather than the power to regulate commerce. But it was not always clear what power was being invoked. In the *Lottawanna* case the court said, “Congress undoubtedly has authority under the commercial power, if no

⁹ *White's Bank v. Smith*, 1868. 7 Wallace, 646, at 656.

¹⁰ 190 U. S. 169. 1903. ¹² 20 Howard, 296. 1857.

¹¹ 12 Howard, 443. 1851. ¹³ 4 Wallace, 555. 1866.

¹⁴ 191 U. S. 17. 1903.

other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulations are not coterminous, it is true, but the latter embraces much the largest portion of the ground covered by the former. Under it Congress has regulated the registry, enrollment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of ship-owners for the negligence and misconduct of their captain and crews; and many other things of a character truly maritime.”¹⁵ In the *Daniel Ball*¹⁶ federal regulation was justified on both the grounds that the steamer was plying a navigable river of the United States and that it was engaged in interstate commerce.

The later views of the Supreme Court, however, seem to be that in regulating navigation Congress derives ample authority from the admiralty clause. This is clearly set forth in *Ex parte Garnett*¹⁷ where the court said, “It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of ship-owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but in maritime matters it extends to all matters and places to which the maritime law extends.”¹⁸

¹⁵ 21 Wallace, 558, at 577. 1874.

¹⁶ 10 Wallace, 557. 1807.

¹⁷ 141 U. S. 1. 1891.

¹⁸ *Ex parte Garnett*, 1891, 141 U. S. 1, at 12.

But it should be remembered in this connection that, whether the power to regulate was derived from the admiralty clause or the commerce clause, the regulations are certainly in the nature of commercial regulations. Having the additional constitutional grant of power furnished by the admiralty clause, the federal government has made more drastic regulations with regard to transportation by water than by land. A few cases may be cited by way of example to show how these regulations have extended into the domain of the states.

Through its power to regulate navigation, whether considered as derived from the admiralty clause or the commerce clause, Congress has assumed jurisdiction over all the navigable waters of the United States. This has been done even against the wishes of some particular state.¹⁹ Congress has established maritime "rules of the road" and these have been held to apply to dredged channels in a harbor²⁰ and even to inland waters²¹ the same as to the open seas. It has provided that a vessel must operate under a federal license even though plying between two ports in the same state.²² It has determined upon a limited liability for ships and this has been held to apply to vessels navigating a river between two ports of the same state.²³ It has regulated the contractual relations between the employer and employees when the employees were seamen and engaged in commerce which was not wholly within a state.²⁴ While Congress has had control over navigable rivers even when

¹⁹ *Wisconsin v. Duluth*, 1877, 96 U. S. 379.

²⁰ *The Delaware*, 1896, 161 U. S. 459.

²¹ *The Magnolia*, 1857, 20 Howard, 296.

²² *The Daniel Ball*, 1870, 10 Wallace, 557.

²³ *Ex parte Garnett*, 1891, 141 U. S. 1.

²⁴ *Patterson v. The Bark Eudora*, 1903, 190 U. S. 169.

lying within the limits of a state, it has been held that in the absence of congressional regulation the state has authority over bridges and other obstructions.²⁵ However, in 1890 Congress passed a law providing "That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited."²⁶ Not only has this law forbidding state interference with the navigability of streams within their borders been upheld, but diversion of water for irrigation purposes so as to interfere with the navigability of a stream has been held to be a violation of this law.²⁷

Whatever powers the states enjoy, then, over the navigable waters within their borders, when such waters form a part of an interstate waterway system, are enjoyed by the sufferance of the federal government. Congress has jurisdiction over all waters, over which navigation with foreign countries or between two states is possible.²⁸ A state may not regulate this navigation, even though Congress has not acted.²⁹ Whatever regulations a state is permitted to make must be of a purely local character, such as regulations dealing with pilotage,³⁰ quarantine,³¹ port regulations,³² and wharfage,³³

²⁵ *Gilman v. Philadelphia*, 1866, 3 Wallace, 713; *Escanaba Company v. Chicago*, 1883, 107 U. S. 678.

²⁶ 26 Stat. at L. 454, sec. 10.

²⁷ *United States v. Rio Grande Dam, etc., Co.*, 1899, 174 U. S. 690.

²⁸ *Leovy v. United States*, 1900, 177 U. S. 621.

²⁹ *Gibbons v. Ogden*, 1824, 9 Wheat. 1.

³⁰ *Cooley v. Board*, 1851, 12 Howard, 299.

³¹ *Morgan's Steamship Co. v. Louisiana Board of Health*, 1886, 118 U. S. 455.

³² *The Brig James Gray v. The Ship John Fraser*, 1858, 21 Howard, 184.

³³ *Packett Company v. Catlettsburg*, 1881, 105 U. S. 559.

and even these powers of the states may be eliminated by congressional action.

It is questionable whether Congress, through the commerce clause, can exercise as much control over transportation by land as it has assumed over transportation by water through the commerce clause and the clause defining the admiralty jurisdiction of the federal courts. Certainly it has not done so up to the present time. The Supreme Court has recognized the inherent differences between transportation by water and transportation by land, and in settling each individual case on its merits it has been careful not to adopt a general rule applicable to both. In the *Daniel Ball*,³⁴ after deciding that a boat plying between two ports on a river in Michigan was engaged in interstate commerce because it carried goods destined for other states and goods from without the state, the court guarded itself by saying, "It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation."³⁵

The general rule governing the control of transportation by land is that interstate commerce is subject to regulation by Congress while intrastate commerce comes under the jurisdiction of the states. But it is often dif-

³⁴ 10 Wallace, 557. 1870.

³⁵ 10 Wallace, 565-566.

ficult to determine when commerce is interstate and when it is intrastate. Cases can be cited to show the fine distinctions to which the courts are sometimes driven. In *McNeil v. Southern Ry. Co.*³⁶ the hauling of cars loaded with interstate commodities to a private siding was held to be interstate commerce; while in *Missouri Pacific Ry. Co. v. Larrabee Flour Mills Co.*³⁷ the hauling of empty cars to a private siding for the purpose of loading them with a commodity to be shipped out of the state was treated as intrastate commerce. In the one case the federal government had jurisdiction and in the other the state had jurisdiction.

In the exercise of their police powers the states have been permitted to enforce regulations which incidentally interfere with interstate commerce. The Supreme Court has upheld, as valid police regulations, state inspection laws,³⁸ state quarantine laws,³⁹ and state game laws,⁴⁰ although in each of these cases there was an interference with the interstate transit of articles of commerce. Likewise the states have been permitted to make regulations interfering with interstate train service. The Supreme Court has sustained state laws requiring engineers to be examined from time to time with respect to their ability to distinguish colors;⁴¹ forbidding the running of freight trains on Sunday;⁴² requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a

³⁶ 202 U. S. 543. 1906.

³⁷ 211 U. S. 612. 1909.

³⁸ *Turner v. Maryland*, 1883. 107 U. S. 38.

³⁹ *Reid v. Colorado*, 1902. 187 U. S. 137.

⁴⁰ *Geer v. Connecticut*, 1896. 161 U. S. 519.

⁴¹ *Nashville C. & St. L. Ry. Co. v. Alabama*, 1888. 128 U. S. 96.

⁴² *Hennington v. Georgia*, 1896. 163 U. S. 299.

printed copy of such rates at all their stations; ⁴³ forbidding the consolidation of parallel or competing lines or railway; ⁴⁴ regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto; ⁴⁵ providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made; ⁴⁶ and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent.⁴⁷ In none of these cases did the Supreme Court think that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce.⁴⁸ However, it is important to note in this connection that these powers of the states with regard to interstate commerce are always subject to modification by congressional action.

It should be emphasized that such interference with interstate and foreign commerce is permitted only when the necessities and the convenience of the public seem

⁴³ *Chicago & N. W. Ry. Co. v. Fuller*, 1873. 17 Wallace, 560.

⁴⁴ *Louisville & N. Ry. Co. v. Kentucky*, 1896. 161 U. S. 677.

⁴⁵ *New York, N. H. & H. Ry. Co. v. New York*, 1897. 164 U. S. 628.

⁴⁶ *Chicago, M. & St. P. Ry. Co. v. Solan*, 1898. 169 U. S. 133.

⁴⁷ *Richmond & A. Ry. Co. v. R. A. Patterson Tobacco Co.*, 1898. 169 U. S. 311.

⁴⁸ This summary is taken from *Missouri P. Ry. Co. v. Larrabee Flour Mills Co.*, 1909. 211 U. S. 612.

to demand it and when the regulation is a just and reasonable one. This rule applies, not only to police regulations, but also to the power of the states to tax and to regulate domestic commerce. It should also be noted, as is observed by Professor Willoughby, that "the federal court will examine a state police regulation not only with reference to the fact whether or not it amounts to a direct regulation of interstate commerce, but whether its provisions are in themselves sufficiently reasonable, practicable, and just, as to furnish an excuse and justification for the incidental interference with interstate commerce which their enforcement will necessitate."⁴⁹ Finally, it should be emphasized that, with regard to interstate commerce, state police regulations are invalid if they conflict with existing federal statutes.⁵⁰ This makes such state regulations always subject to change by Congress. It gives the states a limited sphere in which to legislate — a sphere which may always be modified and even eliminated by Congress in the exercise of its plenary power to regulate interstate commerce. Whatever police powers the states may exercise with regard to interstate commerce are exercised, not because of any constitutional rights belonging to the states, but by the grace of Congress.

It is not necessary here to consider what constitutes a just and reasonable state police regulation and what is an unwarranted interference with interstate commerce. That question forms a large part of the works on constitutional law touching on the subject of interstate commerce. What is more important in a study of federal centralization is to indicate if possible, not how the

⁴⁹ *Constitutional Law of the United States*, II, p. 665.

⁵⁰ *Water-Pierce Oil Co. v. Texas*, 1909. 212 U. S. 86.

states have interfered with the exercise of a power constitutionally granted to Congress, but how Congress in the exercise of that power has interfered with the states. It has been noted that railroads, as common carriers, have always been subject to state regulations. That they may be subject to state regulation for public welfare is well settled by a long line of decisions going back at least to *Munn v. Illinois*.⁵¹ The commerce clause has also made them subject to congressional regulation in so far as they are the avenues of interstate trade. It has also been observed how difficult it sometimes is to distinguish between interstate commerce and intrastate commerce. Obviously, it is almost impossible to make regulations affecting the one without affecting the other. Consequently every regulation that Congress has seen fit to make on the subject has in some way affected the relationship of the state government towards the railroads within their borders.

The earlier attitude of Congress towards the railroads was to encourage the building of more lines in order to develop the virgin territory on the frontier. Not until the passage of the Interstate Commerce Act of 1887 did Congress adopt a comprehensive policy of regulation. Not until quite recently, as in the Safety Appliance Acts and the Employers' Liability Acts, has Congress attempted any regulation of the technical operations and liabilities of interstate railroads.

With the enactment of the Interstate Commerce Law the railroads became subject to a dual regulation. As common carriers they were subject to regulation by the states, but the Interstate Commerce Act imposed additional liabilities. Section 8 of the act attempts to pre-

⁵¹ 94 U. S. 113. 1876.

scribe liabilities of common carriers for damages and Section 10 fixes penalties for violating provisions of the act.⁵² The main purpose of the Interstate Commerce Act was to prevent discrimination and the consequent encouragement of monopolies through unfair advantage. The act, however, is clothed in such general terms that it has been given definiteness only by the orders of the Interstate Commerce Commission which it created. Therefore it has been difficult to determine to what extent the federal government may go in controlling the railroads, since each case has been decided on its individual merits. But since the establishment of the Interstate Commerce Commission, the Supreme Court has been inclined to sustain its orders. In 1896 it upheld the orders of the commission requiring carriers to refrain from greater charges for carrying merchandise to one specific place than to another,⁵³ and in a later case criminal punishment was imposed upon an interstate carrier for having made individual discriminations by the giving of rebates.⁵⁴ That Congress may prohibit disapproved practices in interstate traffic is no longer questioned, and in prohibiting such practices Congress is entering a field of legislation occupied by the states. Congress also has taken a positive attitude towards the railroads with regard to combinations in restraint of trade, rates, regulating technical operations, and incorporation, all of which has led it into the province of state regulation.

It is doubtful whether the Sherman Anti-trust Law was intended to apply to railroads. The railroads had

⁵² 24 Stat. at L. 379.

⁵³ *Cincinnati, N. O. & T. Ry. v. Interstate Com. Com.*, 1896. 162 U. S. 184.

⁵⁴ *N. Y. Cent. Ry. Co. v. United States*, 1909. 212 U. S. 481.

been taken care of by the Interstate Commerce Act. But among the first important cases in which the Supreme Court interpreted the Sherman Law were cases dealing with railroad combinations. In the case of *United States v. Trans-Missouri Freight Association*⁵⁵ it was held that a combination of several railways formed for the purpose of fixing charges on competitive freight traffic was illegal, and in *United States v. Joint Traffic Association*⁵⁶ the court reaffirmed and strengthened this decision. A holding company which controlled, through ownership of stock, the operations of competing transportation companies has been held illegal as a combination in restraint of trade.⁵⁷ It should be noted that state laws forbidding the consolidation of parallel or competing railroad lines have also been upheld.⁵⁸

In the determination of rates there has been a tendency for the federal government to invade the domain of the states. Prior to the Interstate Commerce Act it was held that a rate made by a railroad from within a state to a point without a state was an interstate rate, and that a state could not regulate the portion of it which may be charged for the journey within the state.⁵⁹ This holding set aside an earlier decision in which the court sustained a state law which attempted to regulate such interstate rates.⁶⁰ The court has further held that a rate from a point within a state to a point without the state is an interstate rate and that the portion of it which

⁵⁵ 186 U. S. 290. 1897.

⁵⁶ 171 U. S. 505. 1898.

⁵⁷ *Northern Securities Company v. United States*, 1904. 193 U. S. 197.

⁵⁸ *Louisville & N. Ry. Co. v. Kentucky*, 1896. 161 U. S. 677.

⁵⁹ *Wabash St. L. & Pacific Ry. Co. v. Illinois*, 1886. 118 U. S. 557.

⁶⁰ *Peik v. Chicago & N. W. Ry. Co.*, 1876. 94 U. S. 164.

may be charged for the journey within the state is subject to the jurisdiction of the Interstate Commerce Commission.⁶¹ It is decided, then, that a state has no power to fix even a portion of the rate on an interstate journey. Can a state fix rates on its domestic transportation? Until recently such a question would have received an affirmative answer. But even before the enactment of the Transportation Act of 1920 the position of the states was becoming less sure. By the amendment to the Interstate Commerce Act of 1906 the Interstate Commerce Commission was given power to fix rates.⁶² This did not preclude a state from fixing maximum rates on its domestic traffic. In the *Minnesota Rate Cases* in 1913, the Supreme Court decided that, if Congress had not acted, each state was free to establish reasonable maximum intrastate rates for interstate carriers.⁶³ The following year, in the *Shreveport Case*,⁶⁴ the Supreme Court sustained an order of the Interstate Commerce Commission which interfered with the intrastate rates of a state. This was a new departure, but the court took the view that Congress has the power to control the intrastate rates maintained by a carrier under state authority to the extent necessary to remove the resulting unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves. "It is for Congress," the court said, "to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this

⁶¹ *Cincinnati, N. O. & T. P. Ry. v. Int. Com. Com.*, 1896. 162 U. S. 184.

⁶² 34 Stat. at L. 584.

⁶³ *Simpson v. Shepard*, 1913. 230 U. S. 352.

⁶⁴ *Houston Ry. Co. v. United States*, 1914. 234 U. S. 342.

it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.”⁶⁵ From this it would seem that whatever regulations are made by a state with regard to its intrastate rates may always be invalidated by congressional action, because Congress has “control over the interstate carrier.”

In regulating the technical operations of railroads, as in the Safety Appliance Acts, Congress has entered the field of safety legislation. This is a subject over which the states have also legislated. The Safety Appliance Act of 1893⁶⁶ compels interstate carriers to provide automatic couplers for cars and equip locomotives with power driving brakes. This act was sustained by the Supreme Court in the case of *Johnson v. Southern Pacific Company*.⁶⁷ The act was amended in 1903 and its provisions and requirements made to “apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce. . . .”⁶⁸ It should be observed that the amendment would include cars used only for domestic commerce, and that railroads not “engaged in interstate commerce” are of a negligible quantity. The act as amended practically fixes a standard for all cars. This act as amended was sustained by the Supreme Court on the ground that there is a substantial relation between what is required by the act in respect to vehicles used in moving intrastate traffic and the objects which the act is designed to attain,

⁶⁵ *Houston Ry. Co. v. United States*, 1914. 234 U. S. 342, at 355.

⁶⁶ 27 Stat. at L. 531.

⁶⁷ 196 U. S. 1. 1904.

⁶⁸ 32 Stat. at L. 943.

namely, the safety of interstate commerce and those engaged in its movement.⁶⁹

In the Employers' Liability Acts and laws fixing the maximum hours of labor Congress has entered the field of labor legislation. The first Employers' Liability Act of June 11, 1906,⁷⁰ abolished the fellow servant rule and provided that "every common carrier engaged in trade or commerce" between the several states should be liable for the death or injury of "any of its employees" which may result from the negligence of "any of its officers, agents, or employees." This act was held invalid in the first Employers' Liability Cases,⁷¹ as applied to intrastate commerce, and, because it was impossible to separate the parts of the measure, the invalidity with respect to intrastate commerce invalidated the whole act. The provisions of this act apparently were too sweeping in their application. A carrier, by engaging in interstate commerce, does not thereby submit all its relations between employer and employee to the regulating power of Congress. Like the child labor law and the anti-trust laws applied to manufacturing, such a regulation might have reached back and controlled the relations between employer and employees when the employees were not engaged in interstate commerce. The second Employers' Liability Act of April 5, 1908⁷² limited the liability to common carriers "while engaging in interstate commerce" and to employees engaged in such commerce. The Supreme Court sustained the act in this form, hold-

⁶⁹ *Southern Ry. Co. v. United States*, 1911. 222 U. S. 20.

⁷⁰ 34 Stat. at L. 232.

⁷¹ 207 U. S. 463. 1908.

⁷² 35 Stat. at L. 65. The amendment of April 5, 1910, affected only the procedure to be followed in order to recover under the provisions of the act, and described the parties who might recover.

ing that Congress could regulate relations between employers and employees while both were engaged in interstate commerce, even though the fellow servant, because of whose neglect the injury was suffered, was engaged in intrastate commerce.⁷³

From the Second Employers' Liability Cases it would appear that Congress may regulate the relations between employers and employees if such regulations bear a reasonable relation to interstate commerce. On the same ground the courts have upheld regulations fixing maximum hours of labor for employees engaged in interstate commerce. In the case of *Baltimore & O. Ry. Co. v. Interstate Commerce Commission*,⁷⁴ the act of March 4, 1907,⁷⁵ fixing a maximum of sixteen hours of work daily for employees engaged in interstate railway labor, was sustained even though many employees were also engaged in intrastate transportation. A regulation of this kind was construed to have a reasonable relation to movement of interstate commerce, and it was considered impossible to draw a fixed line between those engaged in interstate commerce and those engaged in domestic commerce.

The Adamson Law,⁷⁶ while nominally a law fixing the hours of labor, was in reality passed to avert a general strike which threatened to tie up interstate commerce. It should be noted that this fact entered into the consideration of the court when this law was sustained.⁷⁷

⁷³ Second Employers' Liability Cases, 1912. 223 U. S. 1.

⁷⁴ 221 U. S. 612. 1911.

⁷⁵ 34 Stat. at L. 1415.

⁷⁶ 39 Stat. at L. 721.

⁷⁷ *Wilson v. New*, 1917. 243 U. S. 332. The decision in this case is not satisfactory as laying down a policy. The fact that five different opinions were rendered shows the divided attitude of the court.

Finally, Congress may regulate transportation by land through its power to incorporate railroads and through its power of eminent domain. In *California v. Pacific Ry. Co.*⁷⁸ the court said, "The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. . . . Of course the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of state as well as federal corporations."⁷⁹ Through its power of eminent domain the United States may give a corporation authority to exercise such a power, even if such a corporation is organized by a state.⁸⁰

We are so accustomed to think of the federal government as assuming a greater degree of control over navigation than over transportation by land that we are apt to consider the two conditions of transportation as being essentially different with regard to the congressional regulation to which they may be subjected. But it should be remembered that the congressional policy of

⁷⁸ 127 U. S. 1. 1888.

⁷⁹ *Ibid.*, at 39.

⁸⁰ *United States v. Gettysburg Electric Ry. Co.*, 1896. 160 U. S. 668.

regulating railroads has been pursued for but a few decades, and the above résumé may be helpful in indicating to what extent the regulations have been carried. To what extent it may be possible to carry such a policy in regulating the various avenues of interstate commerce is indicated by Justice Brewer in *Monongahela Navigation Company v. United States*:⁸¹ "The power of Congress is not determined by the character of the highway. Nowhere in the Constitution is there given power in terms over highways, unless it be that clause to establish post offices and post roads. The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce, and the regulation of commerce implies as much control over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it the power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads, and railroads constructed under the authority of the States, and the improvement of natural highways carried on by the general government, that at first it might seem that there was some inherent difference in the power of the national government over them. But the grant of the power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of a

⁸¹ 148 U. S. 312. 1893.

highway. The fee of the soil in neither case is in the general government, but in the states or private individuals. The differences between the two are in the origin — nature made the one, man established the other.”⁸²

Prior to the taking over of the railroads by the government during the recent war congressional regulations had been mainly negative and regulatory. Such regulations were intended to prevent abuses and discriminations. Even congressional interference with state regulations, such as the orders which precipitated the Shreveport Case, were negative in that they merely sought to restrain the states from creating discriminations in interstate commerce. The railroads were considered as powerful agencies, capable of all sorts of evil practices, which should be watched and prevented from engaging in practices harmful to the public. The fact too frequently overlooked was that railroads were business enterprises, some of them weak, others vigorous, but all of them forming a transportation system upon the efficiency of which depended the prosperity of practically every business enterprise in the country. Not until the war had revealed the need of a change of policy did Congress attempt to deal constructively with the railroads. It then enacted the Transportation Act of 1920, better known as the Esch-Cummings Bill.⁸³

The Transportation Act of 1920 was the outgrowth of the administration of the railroads during the war. The exigencies created by the war demanded a greater degree of unification, coördination, and joint use of railway facilities than was considered permissible to private

⁸² *Monongahela Navigation Company v. United States*, 1893. 148 U. S. 312, at 342.

⁸³ Act of Feb. 28, 1920. 41 Stat. at L. 456.

management under the anti-trust laws. A greater degree of governmental control was deemed necessary. Consequently on December 26, 1917, the President, acting under authority of the army appropriation bill of 1916, took over the railroads and on March 21, 1918, Congress enacted a measure defining the terms of government operation.⁸⁴ The railroads were operated by the federal government from January 1, 1918, to March 1, 1920. Due to the unusual circumstances created by the war the material equipment had been allowed to deteriorate and the expense of operation had risen during this period. The owners insisted that the railroads should not be returned without provision to aid them in the difficult situation they would have to meet. The result was the Transportation Act of 1920 returning the railroads to private operation and introducing a new policy of federal control.

It is needless here to undertake a detailed analysis of the Transportation Act of 1920.⁸⁵ However, it is important to note that this legislation contemplated the promotion of a railway system on a national scale. To promote such a system the enactment contains provisions dealing with labor, railway consolidation, and restoration of credit. The labor provisions are briefly considered in another connection.⁸⁶ The provisions dealing with consolidation and restoration of credit deserve mention here.

In no connection is the new railway policy of Congress more clearly revealed than in the provisions dealing with consolidation. According to earlier views on the ques-

⁸⁴ 40 Stat. at L. 451.

⁸⁵ For an excellent summary of this act, see E. R. Johnson, "The Problem of Railway Control" in *Political Science Quarterly*, September, 1921.

⁸⁶ Chapter XV.

tion, consolidation was considered an evil to be discouraged, and the Sherman Anti-trust Law, as interpreted by the courts, had forbidden consolidation.⁸⁷ In the Transportation Act of 1920 Congress considered consolidation, not as an evil, but as a necessity. The Senate bill provided for compulsory consolidation and the House bill for voluntary consolidation. The provisions of the House bill, in the main, were adopted and the measure contains three important provisions regarding consolidation. (1) The Interstate Commerce Commission is given power to compel the owners of a railroad terminal to let other roads use it. (2) Carriers may pool their traffic after gaining the permission of the Interstate Commerce Commission. (3) The Interstate Commerce Commission is required to work out a plan for the consolidation of the railroads into a limited number of systems. Obviously, this legislation is an attempt to develop a transportation system suitable to the nation's needs rather than merely a restrictive measure to prevent abuses.

The provisions dealing with the restoration of railway credit also show that Congress was motivated by a desire to promote a railway system on a national scale and under federal supervision. The restrictions to which railroads had been subjected, while doing away with many of the abuses, had not been satisfactory. Applying the same restrictions to all roads had been attended with difficulties. Some were strong and needed curbing; others were weak and needed assistance. Even before

⁸⁷ *United States v. Trans-Missouri Freight Association*, 1897, 186 U. S. 290; *United States v. Joint Traffic Association*, 1898, 171 U. S. 505; *Northern Securities Company v. United States*, 1904, 193 U. S. 197.

the taking over of the railroads by the government, railway finance was in a questionable condition. The financial difficulties were accentuated by the changed economic conditions resulting from the war, and when the government was ready to return the roads it was obvious that some provision had to be made for the restoration of railway credit. Consequently provisions were included in the Transportation Act which deal with railway finance and indirectly serve to guarantee a reasonable return on railway investments. As temporary measures it was provided that no reduction in rates should be made during the first six months of private operation⁸⁸ and that the net return guarantee, which was assured the railways under government operation, should be continued until September 1, 1920; and an appropriation was made from which loans might be made to the railroads to help tide them over from the period of public to private operation. The most important of the permanent provisions of the act which have to do with the restoration of credit are those dealing with rates. The Interstate Commerce Commission was authorized to divide the United States into a number of districts for rate-making purposes and to fix such rates within these districts as were reasonable and netted a fair return on railway investments.⁸⁹ In authorizing the Interstate Commerce Commission to determine reasonable rates no distinction was made between interstate and intrastate

⁸⁸ Before the end of this period the existing rates were increased by the Interstate Commerce Commission.

⁸⁹ The Act provided that for two years after March 1, 1920, 5.5 per cent per annum was to be construed as a reasonable return and that the Interstate Commerce Commission should be guided by this in fixing rates. This provision has been misconstrued by some as a flat guarantee by the government. After March 1, 1922, the Commission should determine what is a reasonable rate.

traffic. It was imperative that railway credit should be restored. This could be done only if fair returns were secured on railway investments. Constructive regulation could not be hoped for if forty-eight states imposed as many different sets of restrictions. Consequently Congress assumed control in the matter of rate fixing and state regulations were disregarded. The Transportation Act of 1920 also provides that the railroads must secure permission from the Interstate Commerce Commission before they can extend old lines or build new ones, and that railroad securities may be issued only upon permission of the Interstate Commerce Commission and upon terms determined by the Commission.

Obviously in the Transportation Act of 1920 Congress assumes a control over the railroads which hitherto it had not exercised. Formerly the states had fixed maximum rates and, except when the state regulations resulted in a discrimination against interstate commerce, as in the *Shreveport Case*, they had been considered valid. The Transportation Act of 1920 authorizes a federal agency to fix rates in both interstate and intrastate traffic. It was not to be expected that such a measure would remain unchallenged by the states. Some forty-five states were ready to contest the validity of the intrastate rates fixed by the Interstate Commerce Commission on traffic within their respective borders. The question was recently decided by the Supreme Court in *Railroad Commission of Wisconsin v. Chicago, B. & Q. Ry. Co.*⁹⁰

This case arose because the Wisconsin Railroad Commission fixed different rates from those of the Interstate Commerce Commission. The railroad brought action

⁹⁰ 42 Sup. Ct. 232, 1922.

to keep the Wisconsin rates from applying. An interlocutory injunction was granted and the Wisconsin Railroad Commission, joined by a number of other states, appealed to the Supreme Court. The court upheld the constitutionality of the Transportation Act in so far as it authorized the Interstate Commerce Commission to determine rates even between points within a state. Chief Justice Taft, who wrote the opinion, left little doubt regarding the supremacy of Congress in the determination of rates. He asserted that "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing commerce is clear. . . . In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."⁹¹

The important thing about the Transportation Act of 1920 and the decision in the Wisconsin Railroad Commission case from the standpoint of centralizing control in the federal government is the tendency to consider the

⁹¹ *Ibid.*, at 238.

individual railroads as parts of a national transportation system which must be under federal control if it is to be made adequate to the nation's needs. The difficulty of distinguishing between interstate and intrastate commerce is clearly indicated by Chief Justice Taft: "Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."⁹²

In conclusion, it should be noted that transportation is a subject which inherently lends itself to federal control. The organization of modern business enterprise does not follow state lines. More and more communities are becoming interdependent. Transportation systems constitute the arteries of trade upon which people throughout the nation, irrespective of state lines, depend for their sustenance. With the development of modern transportation facilities, there is an increasing need of a centralized control and Congress is responding to this need. Through the admiralty clause and the federal registry of ships, Congress has assumed a greater degree of control over navigation than it has over transportation by land. But it is significant that it is constantly assum-

⁹² *Ibid.*, at 237.

ing a greater control over the railroads. This is viewed by many as a usurpation of the powers of the states. It is more reasonable to consider the increasing federal control as the application of a constitutional provision, such as the commerce clause, to changed conditions. The federal government was vested with control of interstate commerce to prevent the different states from interfering with such commerce through local regulations. Since the Constitution was drafted there has developed a transportation system the different parts of which are so interrelated that even a state's determination of intrastate rates may constitute an interference with interstate commerce. It is certainly not contrary to the spirit of the Constitution that Congress should act to prevent such an interference.

Finally, it is important to observe that the Transportation Act of 1920, which marks a departure from a negative and restrictive type of regulation to an affirmative and constructive one, also probably indicates a turning point towards a more decisive centralized control. When a negative policy prevailed the states could share in adding restrictions. To carry out a constructive program which purports to develop a national transportation system adequate to the country's needs, there must be unified and concerted action. In such a program the states must confine themselves to regulations which are purely local in import and application. A constructive policy towards the railroads will increase rather than decrease governmental control, and from the very nature of the transportation system it is probable that this control will be assumed by the central government.

CHAPTER XIV

CORPORATIONS AND BUSINESS COMBINATIONS

IN considering the manner in which the federal government has encroached upon the states and the extent to which such encroachment has been carried with regard to control over corporations and business combinations, it is convenient to approach the subject from three points of view. In the first place, there has been a curtailing of the power of the states to regulate corporations, because in regulating them the states are apt to interfere with interstate commerce. Secondly, the federal government has assumed a positive policy in defining and regulating certain business combinations — a policy which will be enforced regardless of the wishes of the states. Finally, the federal government has assumed the power to issue charters of incorporation. The subject will be considered in this chapter from these three points of departure.

(1) With regard to purely domestic corporations, there is no question about the power of the state over the corporation. Such a corporation is a creature of the state and the state may refuse to grant a charter or may grant it under its own terms. With regard to the power of a state over a foreign corporation doing business in the state, the case is not so simple. Theoretically a state can prevent a foreign corporation from doing business within its boundaries, and what the state can exclude it can admit on hard terms. This doctrine

has received classic expression in the case of *Paul v. Virginia*¹ where the court said, "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."²

The control of a state over a foreign corporation, however, is not nearly so potent as might appear from the dicta in *Paul v. Virginia*. The power of the federal government under the commerce clause is paramount to the power of the states over foreign corporations. The Supreme Court has stated this as follows: "So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all."³

These dicta from *Paul v. Virginia* and the *Northern Securities* case can be reconciled by saying that while a state may exclude a foreign corporation it may not exclude the products of such a corporation if the products are legitimate articles of commerce. This is clearly stated by one authority as follows: "A State can admit or refuse a corporation to do business in the State. But

¹ 8 Wall. 168. 1868.

² *Ibid.*, at 181.

³ *Northern Securities Co. v. United States*, 1904. 193 U. S. 197, at 350.

it has no power to exclude a corporation from doing an interstate business within its borders.”⁴ This limitation necessarily operates in such a way as to abridge the powers of the states in dealing with foreign corporations.

While the Supreme Court has admitted that a state has power to exclude a foreign corporation from doing business in the state, it has not attempted to define what constitutes doing business in a state. Each individual case has been decided on its respective merits. In the case of *Cooper Manufacturing Company v. Ferguson*,⁵ Judge Matthews, in a concurring opinion, makes clear the distinction between excluding a corporation and excluding its products: “Whatever power may be conceded to a State to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the States; for that would be to invade the jurisdiction which, by the terms of the Constitution of the United States, is conferred exclusively upon Congress. . . . It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that State, and to prohibit it from carrying on within that State its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the States.”⁶

It is established beyond question that a state cannot prohibit a foreign corporation from shipping legitimate

⁴ David K. Watson, *The Constitution of the United States*, I, p. 543.

⁵ 113 U. S. 727. 1885.

⁶ *Cooper Manufacturing Company v. Ferguson*, 1885. 113 U. S.

articles of commerce into its territory. This cannot be done even when the corporation is engaged in a traffic which cannot be pursued as of right.⁷ Nor can a state discourage the introduction of such goods by requiring a license tax on agents selling by sample, even though the tax is not discriminatory and applies to domestic as well as to foreign firms.⁸ A state law, the Supreme Court has said, can only legitimately affect commerce between the states, "In the exercise of its police power, and its jurisdiction over persons and property within its limits when it provides for the security of the lives, limbs, health and comfort of persons and protection of property."⁹

The power of a state, then, to close out a foreign corporation is not a plenary or even an effective power. A state may prohibit a foreign corporation from establishing a commercial domicile within the state.¹⁰ That is practically as far as the state can go without its actions being repugnant to the commerce clause. The corporation, if excluded from a state, can move across the border and from there continue to send its salesmen into the state from which it is excluded and to ship its products into the state.

But while the definition of "doing business within a state" has been limited to establishing a commercial domicile or a plant, or to transacting intrastate business, it is questionable whether a state has absolute powers even to prescribe the conditions under which a foreign corporation may engage in such an undertaking. Some

⁷ For a discussion of this, see Chapter X.

⁸ *Robbins v. Shelby County Taxing District*, 1887. 120 U. S. 489.

⁹ *Ibid.*, at 493.

¹⁰ *Cooper Mfg. Co. v. Ferguson*, 1885. 113 U. S. 727.

interesting cases have come up in this connection over state laws requiring, as a condition to doing business in the state, that foreign corporations must relinquish their constitutional right to remove a suit from a state to a federal court on the grounds of diversity of citizenship. In *Home Insurance Company v. Morse*¹¹ the Supreme Court held such a state law invalid, but in a later case refused to issue an injunction forbidding a state officer to revoke a license of a foreign corporation that had violated its agreement not to remove a suit to the federal courts.¹² The court held that it could not thus control the actions of a state official. Finally, in *Security Mutual Life Insurance Company v. Prewitt*¹³ it was decided that a state could provide by statute that if a foreign insurance company should remove to a federal court a suit which had been commenced in a state court, the license of the company to do business within the state would thereupon be revoked. In this case the court took the liberal view that "a State has power to prevent a company from coming into its domain, and that it has the power to take away the right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives."¹⁴

It is difficult to reconcile the view taken in the *Prewitt* case with that taken later in *Western Union Telegraph Company v. Kansas*¹⁵ where the doctrine was declared that a charter fee of a certain per cent of the entire capital stock might not be exacted of a foreign corporation as a condition to being permitted to con-

¹¹ 20 Wallace, 445. 1874.

¹² *Doyle v. Continental Ins. Co.*, 1876. 94 U. S. 535.

¹³ 202 U. S. 246. 1906.

¹⁴ *Ibid.*, at 257.

¹⁵ 216 U. S. 1. 1910.

tinue to do an intrastate business within the state. Such an exaction, the court held, was in essence a burden and tax on the company's interstate business and on its property located and used outside of the state. The court attempted to reconcile this decision with that in the Prewitt case by saying, "The vital difference between the Prewitt case and the one now before us is that the business of the insurance company involved in the former case, was not, as this court has often adjudged, intrastate commerce, while the business of the telegraph company was primarily and mainly that of interstate commerce." Such a distinction is mainly an academic one. The fact remained that in the Prewitt case a state was permitted to exact of a foreign corporation, as a condition to its doing business within the state, that it should forego the exercise of a constitutional right, while in the Western Union case this was not done. Justice White, concurring in the Western Union case, took the view that the corporation having been permitted to enter the state and construct a plant there, the condition attempted to be imposed by the state as a prerequisite to its remaining was confiscatory and not due process of law. This view might offer a better basis for reconciling this case with the Prewitt case than the fact that the Supreme Court has held that insurance is not commerce.

In the recent case of *Terral v. Burke Construction Company*¹⁶ all attempts at reconciliation with the views expressed in the Prewitt case were abandoned by the court. Chief Justice Taft, delivering the opinion of the court, states that the cases of *Doyle v. Continental Insurance Company* and *Mutual Life Insurance Com-*

¹⁶ 42 Sup. Ct. 188, 1922.

pany *v. Prewitt* "must be considered as overruled and that the views of the minority judges in those cases have become the law of this court."¹⁷ The facts in the Terral case were similar to those in the Prewitt case. A statute of the state of Arkansas made it the duty of the state Secretary of State to revoke the charter of a foreign corporation if the corporation removed a suit to a federal court. The company argued that it was organized for the purpose of doing construction work and carrying on interstate commerce, and was actually so engaged in Arkansas. Whether or not the company was actually engaged in interstate commerce apparently was not considered important by the court, and the decision did not hinge on that point. The state law was declared unconstitutional.

In concluding the opinion in the Terral case, Chief Justice Taft said, "The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the federal Constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is

¹⁷ *Ibid.*, at 189.

void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law.”¹⁸ In the light of this decision, then, a foreign corporation has certain constitutional rights which a state may not ask it to waive as a condition to its doing business in the state. This, of course, would mean that a state is not unrestrained in imposing conditions upon foreign corporations, even though such corporations are not engaged in interstate commerce, and the sweeping dicta in *Paul v. Virginia* will have to be modified.

Not only are the states powerless to prohibit the importation of legitimate articles of commerce from foreign corporations, but they are restricted especially in their power to deal with common carriers engaged in interstate commerce. The earlier opinions were more liberal towards the states in this respect than the more recent opinions have been. In *Osborne v. Mobile*¹⁹ the Supreme Court sustained a tax on express companies doing business in the city of Mobile even though this tax was so graduated that a greater burden was placed on interstate traffic than on local traffic. The court held this was a tax for the privilege of doing business in the city of Mobile. Later in the case of *Leloup v. Mobile*²⁰ this doctrine was repudiated absolutely and explicitly, and it was held that no state tax could be valid which imposed a burden upon persons engaged in interstate commerce for being so engaged. “No state,” said the court, “has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts

¹⁸ *Ibid.*, at 189. ¹⁹ 16 Wall. 479. 1872. ²⁰ 127 U. S. 640. 1888.

derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and demands a regulation of it, which belongs solely to Congress.”²¹

Such dicta express the prevailing opinion as distinguished from earlier views. In the State Freight Tax Case²² it was held that a state could not constitutionally impose and collect a tax upon the tonnage of freight taken up within its limits and carried beyond them; but in the same year it was still held that a tax upon the gross receipts for transportation by a railroad chartered by the state was not unconstitutional.²³ These two cases might be said to mark the period of transition from a liberal to a more strict policy with regard to the powers of the states to interfere with interstate commerce through taxation. In *Philadelphia Southern Mail SS. Company v. Pennsylvania*²⁴ and in *Galveston, H. & S. A. Ry. Co. v. Texas*²⁵ the principle adhered to in the State Tax on Railway Gross Receipts case was abandoned. Such taxes are now declared invalid as an interference with interstate commerce. In *Western Union Telegraph Company v. Massachusetts* it was even held that a state cannot enforce the collection of a valid tax by an injunction restraining a person or corporation from doing interstate commercial business.²⁶

In summary it can be said that, while a state theoretically may prescribe the conditions under which a corporation may engage in business as a corporation within the state, it cannot directly interfere with the interstate

²¹ *Leloup v. Mobile*, 1888. 127 U. S. 640, at 648.

²² 15 Wall. 232. 1872.

²³ *State Tax on Railway Gross Receipts*, 1872. 15 Wallace, 284.

²⁴ 122 U. S. 326. 1887.

²⁵ 210 U. S. 217. 1908.

²⁶ 125 U. S. 530. 1888.

business of the corporation. To use the language of Professor Willoughby, "Permission to continue to do an interstate business may not be founded upon conditions which, in effect, interfere with interstate business."²⁷

(2) By enacting the Sherman Anti-Trust Law in 1890 Congress assumed an aggressive policy towards business combinations. In thus attempting to regulate business combinations in restraint of trade it entered a field in which the states had legislated with practically no federal interference. Congress received its authorization to deal with business combinations through the commerce clause. The state could suppress conspiracy which was a crime under the common law. The common law of conspiracy, however, was uncertain as to the nature and extent of illegal practices, and the states have attempted to correct such common law inadequacies by the enactment of anti-trust laws. State anti-trust laws have been sustained by the United State Supreme Court both in their application to local dealers²⁸ and to common carriers.²⁹ Thus, as in the case of the railroads, business combinations have become subject to both federal and state regulation. It might be urged that only such business as is engaged in interstate commerce comes under federal control, but when one considers the wide ramifications of modern commercial enterprises, it must be observed that certainly every large business comes under the jurisdiction of the federal government as well as that of the states.

Professor Freund has pointed out that in our anti-trust legislation practically nothing has been done to specify forbidden practices with adequate certainty.³⁰

²⁷ *Constitutional Law of the United States*, II, p. 698.

²⁸ *Smiley v. Kansas*, 1905. 196 U. S. 447.

²⁹ *Louisville & N. Ry. Co. v. Kentucky*, 1896. 161 U. S. 677.

³⁰ *Standards of American Legislation*, pp. 72 *et seq.*

The Sherman Law is typical in this respect. It declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the states. . . ." ³¹ Such sweeping provisions necessarily removed any doubt under the common law as to whether a combination in restraint of trade constituted a tort or a crime. But the doubt as to the precise practices which the act was intended to discourage was not removed. Consequently it is difficult to ascertain to what extent the federal government can proceed under the Sherman Law. In *United States v. Trans-Missouri Freight Association* ³² the act was interpreted literally. It was held that the Sherman Law had a broader application than prohibiting restraints of trade unlawful under the common law and that any agreement restraining competition between two separate concerns, except certain covenants incidental to the sale of goodwill or to an employment, was liable to prosecution by the federal government, irrespective of its economic purpose and effect. In later decisions, however, it has been indicated that the courts must decide "in the light of reason" whether a combination is intended to destroy competition, or whether it is an honest attempt to introduce economies, and that if the intent is the latter the combination is not unlawful. ³³ In the Clayton Act of 1914 there is an attempt to be more specific with respect to enumerating certain practices which are prohibited. ³⁴ But in the act creating the Federal Trade Commission

³¹ 26 Stat. at L. 209.

³² 166 U. S. 290. 1897.

³³ *Standard Oil Co. v. United States*, 1911. 221 U. S. 1; *United States v. American Tobacco Co.*, 1911. 221 U. S. 106; *United States v. Terminal R. R. Assn. of St. Louis*, 1912. 224 U. S. 383.

³⁴ For the Clayton Act, see 38 Stat. at L. 730.

there is no attempt at definition.³⁵ The Trade Commission is empowered to investigate business practices and can prohibit them if found contrary to the act. Its orders are subject to judicial review, and disobedience to these orders is liable to punishment. This is a rational attempt, Professor Freund contends, "to improve upon the method of the anti-trust legislation, which in the matter of restraint of trade achieved very little, if any, progress beyond the common law."³⁶ But this necessarily leaves the matter unsettled as to what practices the federal government will attempt to prohibit and consequently how far it will regulate practices which the states likewise are empowered to regulate.

While the Sherman Law is vague and general in defining practices to be forbidden, no such vagueness now characterizes it with regard to the type of business enterprise to which it is applicable. By a long line of decisions it has been determined what organizations come under the regulating power of the federal government as expressed in anti-trust legislation. Only a few of these decisions need be cited here to indicate how the power of the federal government has expanded in this field.

For our purposes the greatest importance attaches to one of the earliest cases, the case of *United States v. E. C. Knight Sugar Ref. Co.*³⁷ In this case it was held that the Sherman Law was designed to apply only to commerce and not to manufactures, that manufacturing did not lie within the control of Congress and that a combination of sugar refiners, even though it was organized to form a monopoly, was not a violation of the

³⁵ For this act, see 38 Stat. at L. 717.

³⁶ *Standards of American Legislation*, p. 75.

³⁷ 156 U. S. 1. 1895.

law unless these same refiners and manufacturers attempted also to monopolize interstate commerce in sugar. There was no new doctrine advanced in this decision. It merely followed the principle expressed in *Kidd v. Pearson*³⁸ which later found expression in a modified form in the first Child Labor Case.³⁹ These decisions hold that, under its power to regulate commerce, Congress cannot regulate manufactures. To hold otherwise would be to permit Congress, not only to regulate the conditions under which articles of commerce are transported from state to state, but to reach back and prescribe the conditions under which such articles shall be permitted to be produced. Such a view would totally disregard the absolute power of the states to legislate in strictly local matters, and for this reason the Supreme Court has consistently avoided permitting federal regulation to extend to manufactures. This, of course, does not mean that a manufacturer who also engages in interstate commerce by selling his products across state lines is exempt from the provisions of federal anti-trust laws. It has been held that a number of meat packing corporations combined in restraint of trade is illegal.⁴⁰ But it should be noted that manufacturing is not commerce *per se*, nor does it bear a close enough relationship to commerce to permit the federal government to prescribe the conditions under which it is to be conducted.

The Sherman Law has always been sustained whenever applied to combinations engaged in interstate trade. It was early held to be applicable to railroads,⁴¹ and

³⁸ 128 U. S. 1. 1888.

³⁹ *Hammer v. Dagenhart*, 1918. 247 U. S. 251.

⁴⁰ *Swift et al. v. United States*, 1905. 196 U. S. 375.

⁴¹ *United States v. Trans-Missouri Freight Association*, 1897. 166 U. S. 290. *United States v. Joint Traffic Association*, 1898. 171 U. S. 505.

some of the leading cases have involved combinations of railroads.⁴² In interstate trade mere agreements not to compete have been held to violate the Sherman Law;⁴³ "corners" in staple products have been held to be restraint of trade;⁴⁴ publishing lists of wholesalers who sell directly to customers instead of through retailers has been held to be restraint of trade as prejudicing retailers against such wholesalers;⁴⁵ and the labor boycott has been held to be restraint of trade,⁴⁶ and subject to restraint by injunction.⁴⁷ Such decisions indicate the extent to which the federal government can go in regulating business combinations.

(3) It has been observed that when the question of giving Congress power to issue charters of incorporation arose in the Federal Convention it encountered serious opposition. It apparently was not clear to the fathers whether or not the Constitution conferred such powers upon Congress.⁴⁸ The question, however, soon came up under the new government with reference to the power of Congress to incorporate a national bank. Again the constitutionality of such an act was attacked. In response to Washington's request for information on the subject both the Attorney General and the Secretary of State expressed themselves as of the opinion that Con-

⁴² The case deciding whether a holding company came under the Sherman Law involved competing railroads combined in such an organization, *Northern Securities Co. v. United States*, 1904. 193 U. S. 197. The "rule of reason" has also been applied to railroads, *United States v. Terminal Ry. Assn. of St. Louis*, 1912. 224 U. S. 383.

⁴³ *Addyston Pipe, etc., Co. v. United States*, 1899. 175 U. S. 211; *Montague & Company v. Lowry*, 1904. 193 U. S. 38.

⁴⁴ *United States v. Patten et al*, 1913. 226 U. S. 525.

⁴⁵ *Eastern Retailers Assn. v. United States*, 1914. 234 U. S. 600.

⁴⁶ *Loewe v. Lawlor*, 1908. 208 U. S. 274.

⁴⁷ *Gompers v. Buck's Stove and Range Co.*, 1911. 211 U. S. 418.

⁴⁸ *Madison Papers*, III, p. 1576 *et seq.*

gress had no power under the Constitution to issue charters of incorporation to an institution, even though that institution was quasi-public in character such as a national bank. Alexander Hamilton, as Secretary of the Treasury, however, was opposed to such a strict construction of the Constitution, and in a letter to the President he presented an able argument in favor of incorporating a bank and contended that such action was constitutional. Hamilton contended that, even though the national government was one of enumerated powers, Congress had power to enact such legislation as was "necessary and proper" to carry out these powers.⁴⁹

The argument of Hamilton was followed by Chief Justice Marshall when the validity of the act incorporating a national bank was questioned before the Supreme Court.⁵⁰ Marshall took the view that "although, among the enumerated powers of government, we do not find the word 'bank,' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."⁵¹ He then concluded that Congress could adopt necessary and proper means to carry out the foregoing powers and therefore had power to incorporate a bank as a means to a legitimate end. "Let the end be legitimate," said Marshall, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."⁵²

⁴⁹ Hamilton to Washington, Feb. 23, 1791, *Works* (3 vols., N. Y., 1810), I, pp. 111 *et seq.*

⁵⁰ *McCulloch v. Maryland*, 1819. 4 Wheat. 316.

⁵¹ *Ibid.*, at 407.

⁵² *Ibid.*, at 421.

Subsequent questions regarding the constitutionality of federal incorporation have been referred back to this opinion of Chief Justice Marshall. The regulation of commerce is one of the powers of the federal government and certainly issuing charters of incorporation can be construed as an appropriate mode of executing such a power. In the past the only charters granted by the federal government have been to banks and transportation companies, and these have not been numerous.⁵³ To what extent charters can constitutionally be granted would be difficult to say. But in this connection it should be noted that in issuing charters of incorporation the federal government is exercising another power which is also exercised by the states. It should also be observed that in the exercise of this power the federal government may create a corporation whose operations cannot be interfered with by the states since such a corporation may be construed to constitute an instrumentality of the federal government.

From this brief treatment of the vast subject of corporations and business organizations some conclusions

⁵³ Watson comments on this as follows: "Probably the first charter granted by Congress was to the Bank of North America by the Congress of the Confederation, Dec. 31, 1781. Charters granted by Congress under the Constitution have been: Bank of the U. S. (1st Stat. at L. 191) (1791); Bank of the U. S. (3 Stat. at L. 266) (1816); Washington, Alexandria and Georgetown Steam Packet Company, Act of March 3, 1829; National Banks (12 Stat. at L. 665) (1862); Union Pacific Railway (12 Stat. at L. 489) (1862); Union Pacific Railway (12 Stat. at L. 489) (1862); Northern Pacific Railroad (13 Stat. at L. 365) (1864); Atlantic and Pacific Railroad (14 Stat. at L. 292) (1866); Washington Mail Steamboat Company, Act of March 25, 1870 (16 Stat. at L. 78); Washington and Boston Steamboat Company, Act of May 4, 1870 (16 Stat. at L. 97); National Bolivian Navigation Company, June 29, 1870 (16 Stat. at L. 168); Texas and Pacific Railroad (17 Stat. at L. 59) (1872); Maritime Canal Company of Nicaragua (25 Stat. at L. 673) (1889)." *Constitution of the United States*, I, p. 576.

may be drawn by way of a summary to indicate the nature of the dual control over such organizations and how federal expansion in this field has been made possible. The control that the federal government has over business organizations is authorized mainly by the commerce clause. But by long established legal principles antedating the Constitution of the United States, a corporation is considered as the creature of the state. The powers therefore which the states of the Union have over corporations are not founded upon constitutional provisions, but are sanctioned by the common law and by historic usage. But in exercising these powers the states are apt to collide with the federal government by interfering with its power to regulate interstate commerce. In such an event the action of the state will be reviewed in a federal court and the state must yield to the plenary power of Congress over interstate commerce. The power of a state to deal with a foreign corporation or with a corporation engaged in interstate commerce is therefore reduced very materially. It may keep a foreign corporation from establishing a commercial domicile in the state, but that is about as far as it can go; and even then, in the light of the decision in the Terral case, it can not impose the waiver of a constitutional right as a condition which such a corporation must meet in order to enjoy the privilege of doing business in the state. To place an embargo against the products of a foreign corporation or even to hamper the free shipment into the state of these wares would amount to an interference with interstate commerce.⁵⁴ If the foreign corporation is engaged mainly in interstate commerce a state cannot lay down unreasonable terms as a condition for its doing an intra-

⁵⁴ Robbins v. Shelby County Taxing Dist., 1887. 120 U. S. 489.

state business,⁵⁵ or subject it to regulations which would impede its conduct of the interstate business.⁵⁶

With regard to corporations doing a purely local business the states alone are empowered to make regulations. But with the development of modern business enterprise such corporations are small and relatively unimportant. The business of every large corporation goes beyond state lines, and when this is the situation the federal government may impose regulations and the regulations imposed by the states become circumscribed in order that they will not interfere with the congressional regulation. In granting charters of incorporation the states may stipulate the conditions under which a charter will be granted, but this does not prevent the federal government from interfering as has been done when two corporations chartered by states attempt to combine.⁵⁷ Likewise the states may regulate the contractual relations between the stockholders and the corporation, but the federal government by means of anti-trust legislation may seriously interfere with these relations.⁵⁸ Finally, it should be noted that the federal government itself possesses power to grant charters of incorporation. So far this power has been exercised sparingly and only to facilitate banking and transportation, but the significance of the federal government possessing such a power should nevertheless not be overlooked.

In conclusion it should be emphasized that when Congress has authority to act its actions are final. The states cannot interfere with the free exercise by Congress

⁵⁵ *Western Union v. Kansas*, 1910. 216 U. S. 1.

⁵⁶ *Leloup v. Mobile*, 1888, 127 U. S. 640.

⁵⁷ *Northern Securities Co. v. United States*, 1904. 193 U. S. 197.

⁵⁸ *Addyston Pipe & Steel Co. v. United States*, 1899. 175 U. S. 211.

of a plenary power. This power may remain dormant in which case the states may regulate. But when the power of Congress over corporations is given expression in legitimate legislation the states must yield. Their powers over corporations become modified by the congressional regulation. Certain limitations are placed upon the power of Congress to regulate. The courts have been careful to distinguish between manufacturing and commerce.⁵⁹ This is important because failure to make such a distinction might open the whole field of factory legislation to congressional control. But aside from this restriction, Congress has practically a free hand in legislating on the subject of business organizations so long as the regulations pertain to interstate trade, and the power of the states to make regulations will necessarily be curtailed in proportion to the extent that Congress exercises this power.

⁵⁹ *United States v. E. C. Knight Co.*, 1895. 156 U. S. 1.

CHAPTER XV

REGULATION OF LABOR

THE policy of regulating conditions of employment is by no means a new one. Such doctrines as the fellow servant rule, contributory negligence, employers' liability, and conspiracy are as old as the common law itself. But until the advent of modern industrialism, the instances where these legal principles were applied were individual cases. With the advent of the machine process and the factory system the common law rules were found to be inadequate and needed to be supplemented by constructive legislation. The states are inherently and constitutionally qualified to enact such legislation, and during the last few decades probably the most important laws passed by the state legislatures have been laws dealing with labor and conditions of employment. The federal government has not enjoyed a direct constitutional authorization to enact such legislation and whatever congressional legislation there is on the subject of labor has received its authorization mainly from the commerce clause.

Labor is necessarily affected, directly or indirectly, by every congressional regulation of commerce. It may receive specific mention in some general legislative policy. This is especially true in the case of general immigration laws by which contract laborers and Orientals are excluded, the purpose being to improve the condition of

the American workingman.¹ Congress may also legislate directly on the subject of labor unions through its power to issue charters of incorporation.² But the only congressional enactments that have affected labor to any considerable degree may be considered under two heads. In the first group may be placed the legislation dealing with labor engaged in the movement of interstate and foreign commerce. In the second class we may place the anti-trust legislation which by judicial interpretation has been construed to apply to labor organizations.

(1) In considering the legislation dealing with labor engaged in the movement of commerce one must note the difference in the case of transportation by water and transportation by land. It has been observed that, owing to a liberal construction of the commerce clause and the clause defining the admiralty and maritime jurisdiction of the federal courts, in transportation by water there is really no distinction, with regard to the extent of congressional control, between interstate and intrastate commerce.³ The registry of the craft rather than the nature of its commerce apparently determines whether or not Congress can prescribe regulations. Consequently congressional regulations governing the relations of seamen to masters of vessels in the registry of the United States have been more sweeping in their application than have been the regulations governing the relations of employees and operators of railroads.

¹ General Immigration Law of 1907. 34 Stat. at L. 898.

² By an act of June 29, 1886, provisions were made to incorporate National Trade Unions. 24 Stat. at L. 86. This act, as amended June 1, 1898, provided that such trade unions must expel a member if he participated in violence, and that the constitution and by-laws of the unions should contain provisions to that effect. 30 Stat. at L. 427.

³ Chap. XIII.

It apparently is taken for granted that Congress has power to regulate the contractual relations between masters and men and the conditions of employment on vessels in the registry of the United States irrespective of where those vessels ply. Congress has exercised such a power ever since our government was established. One of the earliest acts of Congress made provisions for the apprehension of deserting seamen.⁴ The general law of June 7, 1872⁵ covered fully the conditions of employment on ships and the contractual relations, such as conditions of apprenticeship, wage contract, payment of wages, etc.; and provided for the apprehension of deserting seamen and punishment for disobedience. A similar policy of regulating relations between employers and employees on board American vessels is shown in the La Follette Act of 1915.⁶

The power of Congress to enact such legislation has seldom been questioned. Cases have arisen, however, where it has been alleged that, in regulating the contractual relations between masters and men, Congress has infringed constitutional guaranties. For example, it has been held that the Thirteenth Amendment does not extend to seamen.⁷ But unlike transportation by land, in regulating conditions of employment on ships and contractual relations between employers and employees, such regulations are held valid without questioning the relationship of the regulation to the facility of movement of interstate and foreign commerce.⁸ Apparently, it is

⁴ Act of July 20, 1790, 1 Stat. at L. 139.

⁵ 17 Stat. at L. 262.

⁶ Act of March 4, 1915; 38 Stat. at L. 1169.

⁷ *Robertson v. Baldwin*, 1897. 165 U. S. 275.

⁸ *Patterson v. Bark Eudora*, 1903. 190 U. S. 169.

taken for granted that, in the case of registered ships, such a relationship necessarily exists.

With regard to transportation by land the courts have been more cautious in permitting Congress to regulate labor conditions. This has probably been due to the fact that here there is danger of conflicting with state legislation. At all events, there has been a tendency to limit the power of Congress to enact labor legislation. By a number of decisions issuing from the Supreme Court a rule or standard has been adopted for testing the constitutionality of such legislation. If the regulation is aimed to facilitate the movement of interstate commerce, and if there is a reasonable relation between the regulation and the movement of such commerce, the court will sustain the legislation. This seems to have been the criterion adopted by the courts for judging the constitutionality of such regulative measures. The mere fact that both employers and employees are engaged in interstate commerce, or even in the movement of interstate commerce, will not permit Congress to regulate conditions of employment or the contractual relations between the employers and employees.

This rule is observed in a number of decisions. Because there was a reasonable relationship between safety appliances and the movement of interstate commerce, the laws providing for such appliances have been sustained.⁹ The requirement that the safety appliance regulation should extend to all locomotives and cars used on "any railroad engaged in interstate commerce," even though such cars were engaged only in domestic traffic, has also been sustained.¹⁰ Obviously, here there was a relation-

⁹ *Johnson v. Southern Pacific Ry. Co.*, 1904. 196 U. S. 1.

¹⁰ *Southern Ry. Co. v. United States*, 1911. 222 U. S. 20.

ship between the regulation and the movement of interstate commerce. A uniform type of coupler is necessary on every interstate line and consequently the rule could be applied to cars which, while engaged only in local commerce, were hauled over interstate roads and were part of interstate trains.

In the legislation fixing the maximum hours of labor the relationship is not so obvious. Still it is a reasonable presumption that fatigue would lessen the efficiency of the employees engaged in the movement of interstate commerce, and consequently that such legislation is reasonably a regulation of interstate commerce. For this reason the Supreme Court sustained this legislation even though it applied to many employees who were also engaged in intrastate commerce.¹¹

An illustration of the fact that there must be a reasonable relationship between the regulation attempted and the movement of interstate commerce is furnished by the Employers' Liability cases. The first Employers' Liability Act was held invalid by the Supreme Court because it went further than was necessary as a regulation of interstate commerce.¹² This act made every common carrier engaged in interstate commerce liable for the injury or death of any of its employees and abolished the fellow servant rule in such cases. This would have regulated contractual relations between employers and employees even in intrastate commerce if the employer incidentally were also engaged in interstate commerce. For this reason the law was not sustained. The second Employers' Liability Act was limited in its application to cases where both the employer and employees were

¹¹ *B. & O. Ry. Co. v. Int. Com. Com.*, 1911. 221 U. S. 612.

¹² 207 U. S. 463. 1908.

engaged in interstate commerce. In this form the act was sustained by the court.¹³ From these decisions it appears that regulations affecting the contractual relations of employers and employees, when both are engaged in the movement of interstate commerce, is a valid regulation of commerce; but it is not a valid regulation of commerce if the employees are engaged in domestic commerce. The relationship between such legislation and the movement of interstate commerce is not so obvious as in the case of the Safety Appliance Acts. But naturally there is a closer relationship between the regulation and the movement of interstate commerce when both the employer and the employees are engaged in such commerce than when one of the parties is engaged only in domestic commerce.

The decisions in the Employers' Liability Cases would indicate that Congress cannot regulate industrial relations unless both the carrier and the employees are engaged in interstate commerce. But that both are so engaged is not sufficient to warrant congressional regulation. There must also be a reasonable relationship between the mode of regulation employed and the facility of movement of interstate commerce. In *Adair v. United States*¹⁴ the Supreme Court held invalid an act of Congress making it a misdemeanor for an interstate common carrier to unjustly discriminate against an employee because of his membership in a labor union. It is interesting to observe in this case that the court did not base its decision on the fact that this was not a proper regulation of interstate commerce, but declared such an act invalid for infringing on the constitutional rights of a person by compelling

¹³ Second Employers' Liability Cases, 1912. 223 U. S. 1.

¹⁴ 208 U. S. 161. 1908.

him against his will to retain an employee. However, if there had been a reasonable relationship between the movement of interstate commerce and a regulation of this kind, it is questionable whether such an act might not have been sustained.

It should also be noted in connection with labor engaged in the movement of interstate commerce that injunctions restraining such labor from striking have been granted on the ground that such a strike would interfere with the interstate transit of commodities. This was one of the grounds for granting the injunction in the Debs case.¹⁵ More recently injunctions have been granted to restrain labor unions from violating anti-trust laws and have become associated with such legislation. But it is important to observe that even in the absence of such legislation the federal government may assume power to restrain laborers engaged in the movement of interstate commerce from walking out and thus impeding the transit of interstate shipments.

In order to facilitate interstate commerce, Congress has also sought means of preventing disputes between the carriers and the employees. In 1913 a federal Board of Mediation and Conciliation was created.¹⁶ Both sides to a dispute could avail themselves of the opportunity for arbitration offered by this federal agency, but it was not compulsory, nor did the board have power to enforce its awards. A new departure was made in the Transportation Act of 1920. As has already been noted, this act differs from previous acts in that it purports to be positive and constructive rather than negative and regulatory.¹⁷ This is shown in its provisions dealing with labor

¹⁵ *In re Debs*, 1895. 158 U. S. 564.

¹⁶ Act of July 15, 1913. 38 Stat. at L. 103.

¹⁷ Chap. XIII.

as well as in its other provisions. Provisions were made for the settlement of disputes between the carriers and the employees. It is significant to note that these provisions apply, not only to carriers and employees actually engaged in interstate commerce, but to all carriers and their employees. Like the other provisions of the act, those dealing with labor apparently contemplate a railway system to be treated as an agency of national concern. Section 301 provides that "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof." Such a provision is, of course, hortatory rather than mandatory. However, provisions are made for administrative agencies to aid in the settlement of disputes. In the first place, it is urged that a settlement be reached by a conference of representatives authorized to act for the employers and employees. It is also provided that "Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees and subordinate officials of carriers or organizations thereof." Upon the application of either the employers or the employees, or upon their own motion, the Adjustment Boards may hear and decide disputes over rules and working conditions which have not been settled in local conferences. Finally, the act creates an administrative agency, the Railroad Labor Board, composed of nine members, three from the Labor group, three from the Management group, and three from the Public group. This board is given power to hear and decide disputes

over working conditions if the Adjustment Boards fail; or, if no Adjustment Boards have been established, it can serve in the same capacity as these boards. It is given the additional power of hearing and deciding questions of wages. The Labor Board has power to summon witnesses, administer oaths, and compel the production of books and records. Its power to secure information prior to the rendering of an award is comparable to that of the Interstate Commerce Commission or the Federal Trade Commission. But it has no effective way of compelling the observance of its decisions except the sanction of public opinion. Its only weapon is publicity. Section 313 provides that "The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine." It is not necessary here to comment upon the effectiveness of this method of dealing with labor disputes. Suffice it in this connection to say that the hopes of its sponsors have not been realized in the Labor Board. It is significant, however, in a study of this kind to note that the Transportation Act of 1920 provides an agency for the settlement of industrial disputes in connection with the railroads irrespective of whether these railroads are interstate or intrastate.

It is not our purpose to determine whether the attitude of Congress and the courts with regard to labor engaged in the movement of commerce has been favorable or unfavorable to labor. We are more concerned here with

considering how in attempting to regulate such labor the national government has assumed powers similar to those exercised by the states. In labor legislation of this kind it must be admitted that the expansion of federal power has been relatively slight. Congress has complete control over navigation and consequently has regulated the contractual relations between masters and men on board American vessels. It is questionable whether such a power has been derived from the commerce clause. In *Robertson v. Baldwin* ¹⁸ governmental control over seamen was justified mainly on the ground of historic usage. With regard to transportation by land the courts have been cautious about permitting congressional regulation of conditions of employment or relation of employer and employee. The regulations have usually been sustained only when it was evident that such legislation bore some reasonable relation to the movement of interstate commerce. But even thus narrowly circumscribed, congressional regulation is apt to conflict with state laws, since the states acting within constitutional limitations may also provide for safety appliances, maximum hours of labor, employers' liability, and agencies for the settlement of industrial disputes; and, unless there is a conflict with the congressional regulation, the state legislation will also extend to common carriers engaged in interstate commerce.

(2) It is through the anti-trust laws that the federal government has exercised the greatest control over labor. Such legislation as maximum hours of work regulations and employers' liability laws have affected only a small group of laborers engaged in the movement of interstate commerce. By judicial interpretation the Sherman Anti-

¹⁸ 165 U. S. 275. 1897

Trust Law was made to apply to labor organizations irrespective of the nature of the employment. Consequently the federal government has assumed a supervisory position over the activities of organized labor throughout the United States and has materially interfered with the effective use of such weapons of the labor union as the strike and the boycott. As a result the effectiveness of organized labor as a combatant in industrial strife has been considerably lessened.

When the far-reaching influence of applying the Sherman Law to labor organizations is considered, it is curious to note that there is nothing in the debates of Congress to indicate that the framers of this law intended that it should apply to labor organizations. Yet it is against labor organizations that it has been applied most successfully. It is also interesting to observe, as does Professor Freund, that what success the government has had in enforcing the act "has been through the power of proceeding in equity, which was an afterthought and, as it were, an accident in the history of the preparation and enactment of the law."¹⁹

The Sherman Law, as interpreted by the courts, has affected labor organizations in two ways. In the first place, it has made labor organizations liable for damages for injuries resulting from a violation of the law. In the second place, it has also made them subject to restraint by injunction from carrying out their program of boycotting an employer.

In the Danbury Hatters case,²⁰ which was the first case in which the Sherman law was held to apply to labor organizations, the employer sought damages under the

¹⁹ *Standards of American Legislation*, p. 223.

²⁰ *Loewe v. Lawlor*, 1908. 208 U. S. 274.

Sherman Act. In the pleadings the employer recited that because of a strike a large amount of unfinished products destined for interstate commerce was left in a perishable condition, and also that because of the activities of affiliated labor organizations wholesalers and retailers were compelled to discontinue selling hats produced in his factory. The employer asserted that as a result of this he had suffered financial loss and he contended that the labor organization was liable under the Sherman Act. To this the labor organization demurred on the ground that the Sherman Law did not extend to labor organizations, and the lower court sustained the demurrer. The Supreme Court, however, held that the demurrer should have been overruled, and that the Sherman Law was applicable since the intent of the labor organization was restraint of interstate commerce. In rendering the opinion of the court, Chief Justice Fuller said, "The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes."²¹

In the *Buck's Stove* case²² the same principle was involved. As in *Loewe v. Lawlor*, it was held that the Sherman Act extended to labor unions. The method pursued by the employer, however, was different. Instead of seeking damages under the Sherman Law, he sought to restrain the labor union by an injunction from engaging in an illegal use of the boycott. As in *Loewe v. Lawlor*, the boycott was held to be illegal and the injunction was granted. In permitting an injunction in the

²¹ *Loewe v. Lawlor*, 1908. 208 U. S. 274, at 194.

²² *Gompers v. Buck's Stove, etc., Co.*, 1911. 221 U. S. 418.

Debs case the Circuit Court had proceeded principally upon the Sherman Law.²³ The Supreme Court, however, in the Debs case proceeded on the grounds that the federal government had full power over interstate commerce and mails, but it specifically stated that it did not enter into consideration of the Sherman Law.²⁴ In the Buck's Stove case it was settled that the federal government could restrain organized labor from carrying out its program, not only through its general power to regulate interstate commerce, but because the labor unions, in declaring a boycott that affected interstate shipments, were combinations in restraint of trade.

In the Clayton Act of 1914 a half-hearted attempt was made to remedy the situation brought about through applying the Sherman Act to labor. The Clayton Act legalized the labor union; declared that no injunction should be granted in case of labor disputes unless necessary to prevent irreparable injury to property, and then only after the property had been specifically described in a sworn statement; and declared that no injunctions should prohibit labor from using such weapons as strikes, picketing, and boycotts in industrial disputes.²⁵

²³ 64 Fed. 724. 1894.

²⁴ *In re Debs*, 185. 158 U. S. 564.

²⁵ Sections 3, 6, and 20. 38 Stat. at L. 730. Sections 6 and 20 provide as follows:

Sec. 6. "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

It was not clearly stated whether these provisions applied only to the employers and employees who were directly interested in an industrial dispute or whether they legalized secondary strikes and boycotts. During the debates in Congress the defenders of the measure gave specific assurance that the act did not legalize the secondary boycott.²⁶ But this was not clearly stated in the act itself and it was left for the courts to decide. This question came before the Supreme Court in a recent case.²⁷ In this case the employer, a manufacturer of printing presses in Battle Creek, Michigan, sought an

Sec. 20. "That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms and conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the applications, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

²⁶ *Cong. Rec.*, vol. 51, Pt. 10, p. 9652.

²⁷ *Duplex Printing Press Co. v. Deering*, 1921. 41 Sup. Ct. 172.

injunction to restrain a local union of machinists from refusing to set up the printing presses in New York because organized labor had called a strike in the Battle Creek factory. This was a secondary boycott and it was questioned whether the Clayton Act prevents an injunction from being granted against such a boycott. It was held that the Clayton Act does not exempt secondary boycotts from injunctions. Justice Pitney, who rendered the opinion of the majority, in speaking of the Clayton Act, said, "By no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws. . . . It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. . . . Congress had in mind particular industrial controversies, not a general class war."²⁸

After this decision it is difficult to see how the Sherman Law has been materially changed by the Clayton Act with regard to the legal status of the boycott. In both the Danbury Hatters' case and the Buck's Stove case the opinion was rendered because of an alleged illegal use of the secondary boycott. The right of the employee to quit work or to refuse to patronize his employer was not held to be illegal in these cases. What was prohibited was the use of the secondary boycott in such a manner that the employers' interstate trade would become jeopardized. This apparently is still prohibited under the Clayton Act.

²⁸ Duplex Printing Press Co. v. Deering, 1921. 41 Sup. Ct. 172.

The recent labor decisions of the Supreme Court are of interest in connection with the question of organized labor in general, but do not essentially alter the status of federal control. The Tri-City case had to do with the rights of labor to organize and picket.²⁹ The decision in *Truax v. Corrigan* set aside as unconstitutional a state law prohibiting injunctions against employees on the ground that it was a denial of the equal protection of the law.³⁰ The opinion in the Coronado case has some relation to the question of federal control.³¹ This case arose out of an action for damages under the anti-trust laws instituted by a coal company against a labor union for injuries incurred during a strike. The court held that obstruction to coal mining is not a direct obstruction to interstate commerce in coal and therefore the company could not recover under the anti-trust laws which apply only to interstate commerce. The court, then, in the form of dicta, proclaimed that labor organizations "are suable in the federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in such strikes." Hitherto, in the United States, labor unions, not being incorporated, had been considered as not suable. The dicta are therefore important as possibly heralding a new judicial policy with respect to organized labor. However, comparatively few industrial disputes involve a violation of federal anti-trust legislation and consequently such suits in the federal courts are apt to be infrequent.

²⁹ *American Steel Foundries v. Tri-City Trades Council*, 1921. 42 Sup. Ct. 72.

³⁰ 42 Sup. Ct., 124, 1921.

³¹ *United Mine Workers of America v. The Coronado Coal Company*, 1922. 42 Sup. Ct., 570.

In conclusion it should be noted that the control which the courts have permitted the federal government to exercise over labor has been a negative rather than a positive control. The acts of Congress designed positively to affect labor have been sustained only when such labor was engaged in interstate commerce and when there was reason to believe the regulation would tend to facilitate the movement of such commerce. The anti-trust legislation also has had a negative influence. It has merely prevented labor from engaging in certain practices. However, the influence of this legislation, even though it is negative, must not be overlooked. It is true that the United States has never proceeded against labor organizations as it has against business combinations. But the federal law has been made to extend to these organizations, and their activities may be questioned in a federal court. Consequently the federal government has become a factor to be reckoned with in every serious industrial dispute.

With the development of modern industrialism communities are becoming more and more interdependent. It is becoming more difficult to localize industrial disputes. A strike in one industry materially affects other industries. A strike of railway shopmen in Pennsylvania may cause distress among the farmers of Iowa or Kansas. A strike of coal miners in Illinois causes suffering in Montana or Wyoming. Because of this growing interdependence of different sections of the country we can expect a greater degree of federal interference in labor disputes. Industrial disputes in some of the most essential industries such as food, fuel, and transportation are becoming questions of national concern. Hitherto the federal government has sought to regulate conditions of

labor only in case of American ships and common carriers engaged in interstate commerce. In case of disputes in other industries some federal agency, often the President, has sought by friendly intervention to bring about a solution of the difficulty. This has not always been satisfactory. What the future course of the federal government will be with respect to labor no one can more than surmise. But labor is becoming organized on a national scale and capital is organized on a national scale. A general strike in certain basic industries, notably fuel and transportation, is a national calamity. The states appear to be incapable of dealing with such a problem except locally and more or less sporadically. In view of this, federal regulation may be the only way of coping with the problem.

CHAPTER XVI

REVIEW OF JUDICIAL DOCTRINES

IN a government of restricted and enumerated powers, such as the federal government, the laws must be based upon some specific constitutional provision. The Eighteenth Amendment furnishes a specific constitutional basis for federal liquor legislation. There is no specific constitutional provision justifying federal grants in aid of education or public health. These grants, however, have not been seriously questioned and, since they do not directly interfere with private rights, they do not arouse opposition and may continue to remain unchallenged. They could probably be justified on the ground that the federal government can tax for the general welfare and can dispose of its property, including funds, so long as the purpose is a public one, and education or public health have always been considered as legitimate public purposes for the support of which taxes may be levied and collected. On the other hand, a good argument in opposition to federal grants could be made on the ground that Congress can levy taxes only in order to carry out its enumerated powers and that federal funds raised by taxation can not be diverted to the promotion of activities over which Congress has no constitutional control. In the absence of judicial decisions, however, the constitutionality of federal grants legislation is merely an academic question. Some social and economic legislation has been enacted as taxing measures and postal regulations. The principal constitutional pro-

vision, however, which has been invoked in the enactment of social and economic legislation has been the commerce clause.

In the guise of regulating interstate commerce, Congress has legislated on lotteries, vice, food and drugs, child labor, intoxicating liquors, railroads, business organizations, and labor. In the foregoing chapters we have observed what the attitude of the courts has been toward this legislation. It may be helpful to try to deduce some of the criteria which the courts have laid down for their guidance in their attempts to determine to what extent Congress, in the guise of regulating interstate commerce, may go in enacting police measures. Obviously the commerce clause does not clothe Congress with unlimited power. What, then, are the limitations? A survey of some of the questions which have presented themselves will cast some light on the attitude of the courts towards legislation of this kind.

(1) Does Congress have the power to define commerce? Obviously, if Congress could conclusively define commerce its powers would be greatly enhanced. There are dicta to the effect that the determination by Congress of what constitutes commerce precludes inquiry by the courts. Such dicta were expressed in *Leisy v. Hardin* and in the *Lottery Case*. They may be said to be the exception rather than the rule. In some of the leading cases the Supreme Court has decided whether a business is commercial in its nature. Thus it was decided that manufacturing is not commerce and that insurance is not commerce. The court has repeatedly said that what constitutes an article of commerce is determined by commercial usage and not by an *a priori* definition.

(2) Is the business which is sought to be regulated pursued as of right? If the right to conduct a certain business does not inhere in citizenship the states may make drastic regulations and even prohibit the business. Such callings as trafficking in intoxicating liquors, lotteries, and commercialized vice have existed only through sufferance of the states. The courts have taken the attitude that where the states, in the exercise of their police powers, can prohibit a business, the federal government can refuse to lend the agencies under its control to such an enterprise. Legislation on such subjects as lotteries, vice, and intoxicating liquor has been upheld on this principle. But in a legitimate business the states may make regulations within their borders which Congress cannot make under its power to regulate commerce. A state may regulate the condition of labor under which a legitimate article of commerce is produced. In the Child Labor cases the court held that Congress had no power to make such regulations. However, that a calling can or cannot be pursued as of right does not determine whether or not it comes within the jurisdiction of the federal government. It merely determines the extent to which Congress may go in the exercise of its constitutional powers without impairing the rights guaranteed by the Constitution. Where the calling cannot be pursued as of right the regulation may take the form and effect of prohibition.

(3) Are the articles of commerce injurious *per se*? If articles are actually noxious *per se*, or if the only use for which they are intended will have a demoralizing effect, Congress may prohibit their interstate transportation. Congress may refuse to lend an agency under its control for the distribution of articles which are injurious

to public health and morals. This, in the main, has been the argument for upholding pure food and drug legislation. Conversely, in the Child Labor cases, the court held that harmless and useful articles of commerce could not be excluded from interstate commerce merely because they were the products of child labor.

(4) Does the regulation invade the jurisdiction of the states? There have been dicta to the effect that the only limitations placed upon the congressional power to regulate commerce are those contained in the Constitution itself, such as the Fifth Amendment. To carry such an argument to its logical conclusion, as was done in the dissenting opinion of the first Child Labor case, and by dicta in the Lottery case would be to violate seriously the theory of division of powers, and the states would occupy an independent sphere of supremacy only through sufferance of the federal government. But in decisions the courts have recognized the sphere of independence of the states. Congress, in the guise of regulating interstate commerce, cannot regulate conditions within the states unless the regulations are reasonably incidental to interstate commerce. It should also be noted that whether or not the regulations are reasonably incidental is determined in a measure by the inroads they make upon the jurisdiction of the states. The child labor laws and the clause of the general immigration law purporting to regulate the relations between aliens and other persons were held unconstitutional on the ground that these acts sought to regulate subjects which constitutionally belong to the states. Where congressional acts, in the nature of police regulations, have been upheld, the Supreme Court has stated that these acts were not in conflict with state regulations. Thus the power of the states to regu-

late lotteries, vice, or the liquor traffic within their borders does not preclude congressional regulation among the several states. The court has justified these regulations on the ground that the states have no power over interstate traffic and that consequently there is no conflict.

(5) Does Congress have police power? The decisions are unanimous that Congress has no general police power. It may exercise a police power only over a subject-matter already under its jurisdiction by virtue of some authority delegated to it by the Constitution. However, a police purpose may be the reason for exercising a power possessed on other grounds. It should also be observed that if the purpose and effect of the legislation are police rather than regulation of commerce this does not impair the constitutionality of the enactment, providing that it can be construed as being reasonably incidental to a regulation of commerce. Bearing these constructions in mind it is apparent that Congress can make extensive police regulations through its power to regulate commerce. That it has done so is shown by the considerable amount of social legislation that has been enacted. The power under the commerce clause lends itself peculiarly to the enactment of extensive police regulations because of the universality of commerce. "No trade," says the court, "can be carried on between the States to which it [the power of Congress to regulate commerce] does not extend."¹

Economic legislation dealing with such questions as transportation, business combinations, and labor has necessarily been more clearly in the nature of commercial

¹ *Hipolite Egg Co. v. U. S.*, 1911. 220 U. S. 45, at 57.

regulations than has been the case with social legislation aiming at the suppression of such evils as lotteries, vice, liquor, and child labor. The subject matter of what has here been termed social and economic legislation is therefore somewhat different. There is apparently a closer relationship between economic legislation and regulation of commerce. Consequently in regulating economic matters Congress can go farther without seeming to exceed its constitutional powers to regulate commerce. In enacting social legislation, on the other hand, there is more danger of getting outside the field of commercial regulations and of attempting, in the guise of regulating commerce, to legislate on matter over which the federal government does not have jurisdiction.

As a result of this inherent difference in the subject matter, the legislative purpose in social and economic legislation has not been the same and different methods have been pursued. In the case of social legislation Congress sought to discourage certain practices by refusing to lend the agencies of interstate commerce for their continuance. It sought to close the avenues of interstate commerce to such articles as lottery tickets, liquor to be sold in violation of state laws, products of child labor, and improperly labeled food and drugs. In economic legislation the purpose was to keep interstate commerce open for a free exchange in legitimate articles of commerce.

There is, of course, also a legal distinction which would permit more drastic regulations in social legislation than in economic legislation. Trafficking in intoxicating liquors, lotteries, or commercialized vice are not callings that can be pursued as of right. Consequently in closing the avenues of interstate commerce to such callings

no constitutional rights are impaired. In regulating common carriers and business organizations, Congress has had to deal with persons who were engaged in a legitimate calling. Therefore the policy has been, not to attempt to prohibit the business, but rather to merely prescribe the condition under which it may be conducted.

The differences between what has here been classified as social and economic legislation, however, are not so important as the points of similarity. From the points of similarity some conclusions can be drawn with regard to the congressional policy and the attitude of the courts. In both social and economic legislation one of the underlying purposes has been to protect the consumer against harmful products shipped through interstate commerce and against business practices which would be detrimental to him. By legislation dealing with lotteries and intoxicating liquor he is guarded against indulging in harmful practices; by food and drug legislation he is insured against fraudulent and injurious products; by railroad legislation he is protected against becoming the victim of unjust discrimination; and by anti-trust legislation he is secured against monopolistic combinations with power to fix unreasonable prices. Regulations for the purpose of protecting the consumer of goods shipped in interstate commerce have always been held to be a valid exercise of congressional power under the commerce clause.

However, the consumer is not the only person who derives benefits from such regulations. The purpose of the regulation may also be for the protection of the producer. The producer of legitimate articles of commerce has a constitutional right to ship these goods in interstate commerce. A number of cases have been cited to

show that a state cannot deprive him of this right.² The aim of railroad regulations has been to give him access to interstate channels of trade without his being discriminated against or charged unreasonable rates and to secure for him an adequate transportation system. Likewise the aim of anti-trust legislation has been to give the producer an open market as well as to protect the consumer from monopolistic charges. Consequently conspiracies to discriminate against a producer and thereby to close a market in interstate trade, as in the case of boycotts, have been held to be combinations in restraint of trade.

Finally, it should be observed that in the regulation of transportation and business organizations, as well as in social legislation, certain limitations have been placed upon the powers of Congress. Congress has power to regulate conditions under which goods are transported and to secure to the producer a free channel of trade for the products of his factory. But it does not have power to reach back and regulate conditions in the factory under which those goods are produced. This was the holding in the Child Labor cases which was in line with the earlier opinion in the Knight case³ where it was decided that the Sherman Anti-trust Law did not extend to manufactures. Congress then has no power to enact factory legislation or to regulate conditions of employment. From the Danbury Hatters case it might seem that Congress could regulate conditions of employment in a factory in so far as to interfere in case of industrial disputes. Such, however, was not the case. In the pleadings in this case the employer contended, among other

² *Supra*, Chaps. XI, XIV.

³ 156 U. S. 1. 1895.

things, that when the strike was called a large amount of unfinished products destined for interstate trade was left in a perishable condition and consequently that the labor union was liable under the Sherman Act. If the opinion of the court had been based on this fact it might be said that the Sherman Act applied to manufactures and that it was illegal to call a strike in a factory where goods intended for interstate shipments were being produced. But the court based its opinion mainly on the fact that affiliated labor unions by publishing the name of the employer on the "unfair" list in other states thereby closed his market in those states and that this was restraint of trade. The decision viewed in this light does not modify the rule laid down in the Knight case and later in the Child Labor cases. Making secondary boycotts illegal affects the relationship of the employer and employees, and consequently it indirectly affects the conditions under which goods are manufactured. But this is not the purpose of such a regulation, nor is it limited entirely to labor boycotts. Retailers have been prohibited from publishing the names of wholesalers on the "unfair" list for the same reason that the labor boycott was declared illegal.⁴ Since the Child Labor decision, however, it apparently is settled that in regulating commerce, Congress cannot reach back and regulate conditions of labor under which commodities intended for interstate trade are produced. The only labor regulations Congress can make are those which are necessarily related to the movement of interstate commerce.

The attitude of the courts in restricting the power of Congress to reach back to the source of production and thus enact factory and labor legislation has been prac-

⁴ Eastern Retailers Assn. v. United States, 1914. 234 U. S. 600.

tically the only judicial limitation placed upon the exercise of congressional power under the commerce clause. Important as such a limitation is, it still leaves the federal government in control over a large number of interests over which the power of the states to make regulations has necessarily been curtailed. The complex ramifications of modern business are so extensive that a comprehensive control of interstate commerce affects the interests of everyone. Consequently an increasing number of the commercial interests of the citizens of the several states is becoming more and more affected by the regulative policies of the federal government.

PART IV
HAZARDS AND POSSIBILITIES OF
CENTRALIZATION

CHAPTER XVII

REASONS FOR FEDERAL CENTRALIZATION

VOLUMES have been written in defense or in condemnation of the tendency for the federal government to encroach upon the jurisdiction of the state. A great deal of this literature is illustrative of the tendency of men to justify on rational grounds the attitudes which they have taken on a controversial question. Writers have defended and decried the expanding activities of the federal government. Both sides have sought to justify their position on constitutional and legal grounds. Those in favor of the central government assuming new duties have spoken earnestly about "general welfare"; those opposed have cited the Tenth Amendment. Legalistic controversies of this sort have been of value in casting light upon our constitutional system, but too frequently there has been a failure to realize fully that federal expansion is an actual development to be accounted for rather than a legal concept to be accepted or rejected. Until we face the facts of federal centralization and attempt to account for this tendency we are not in a position to seek a rational solution.

Our constitutional history has been marked by a gradual expansion of the activities of the federal government and by a concomitant diminution of those powers of the states which were formerly regarded as belonging exclusively to them. There has been an evolution from the idea of a *Statenbund* to that of a *Bundesstat*. The

theory of a centralized government, of course, is not a recent development. Since its establishment the United States has been considered as a unit in the family of nations and as having full sovereign rights in its relations with other powers. But with regard to its administrative and legislative powers the federal government has been hedged about by constitutional restrictions. Theoretically its powers have been enumerated and defined. But with the development of modern commerce and industry it has been impelled to exercise these powers over a wider range of interests and activities.

The states have not been entirely passive in watching the growing power of the national government. It is not necessary here to review this struggle; how the states jealously guarded their rights in the Constitutional Convention; with what concern they viewed the early national projects; and how the question regarding the location of final supremacy was instrumental in provoking a war. All this is familiar history. It is important, however, to observe that in spite of the efforts to circumscribe the powers and functions of the national government, its activities are constantly widening and this often results in narrowing the sphere of state regulations. What are the causes for such an increase of federal regulations? Why has it been impossible for the central government to limit itself to the exercise of those powers which were traditionally federal half a century ago? Obviously, these questions cannot be answered with anything like certainty. They involve a consideration of a number of fundamental factors, social and economic as well as political and legal, which are instrumental in determining the functions of modern states. The careful consideration which these questions merit cannot be

given them here. But it may be helpful to indicate certain unifying tendencies that have been at work in our national life and which at present are working towards a centralized political control rather than towards decentralization.

First, it should be noted that the United States is not the only country where the tendency has been from federalism towards centralization of authority. Switzerland has had a similar experience since the Napoleonic period. In the German Empire likewise the imperial government tended to direct with increasing frequency the functions of the states. In the South African Union the idea of a federation was abandoned and the dominion government became a real union in fact as well as in name. Similar tendencies may be observed in the South American Republics. In fact, every federal system of government has had an experience somewhat similar to that of the United States. In all of them the power of the central government has been increased at the expense of the local units.

The tendency, then, in the United States from federalism to centralization is not an isolated phenomenon and can only be accounted for by a consideration of certain causative factors which are not local in their operation but are felt throughout the civilized world. By modern communication, transportation, and finance the whole world has become unified as never before. A few great powers are shaping the political destinies of all. All of the earth's territory is controlled by a few nationalities. A few tongues have replaced the innumerable dialects as international commercial languages. The greater portion of the people of the world are adherents of four or five religions. In fact, the history of individual na-

tions can no longer be localized, but is necessarily a part of the history of a more or less unified mankind.¹ Such unifying influences operate even more intensely within a nation than in international relations.

While centralization in the United States is thus a part of a universal tendency, there are certain factors in this country that make the process more or less individual. The peculiar character of our national government, the presence of a frontier, the lavish supply of natural resources, the heterogeneous character of our population, our political ideals, the nature of our local political institutions, all of these have modified the operation of social and economic forces and have lent a particular interest to political centralization and control in the United States.

Unlike such federal systems as Switzerland and Germany, the central government in the United States is self-sustaining. Its legislative and administrative systems are complete in themselves. It does not have to look to the governments of the states for the execution or administration of its laws and orders. It is able to enact and enforce its own laws, to levy and collect its own revenues, and to operate its own institutions and carry on its functions without assistance from the states. Whether this situation is a unifying or a disintegrating factor is, of course, difficult to say. It might be argued that in a federal system where the decrees of the central government are enforced by the local officials there is necessarily a closer relationship between the general government and the governments of the states than where

¹ James Bryce, Address delivered before the International Congress of Historical Studies, London, May, 1913, quoted in *Current Economic Problems*, ed. by Walton H. Hamilton (Chicago, 1915), pp. 66-67.

each operates independently of the other. But it must also be admitted that in such a system the central government is somewhat dependent upon the good will of the states and therefore the local units exercise an influence upon the policies of the national government to an extent not possible in the United States. In the exercise of any of its powers the government of the United States is restricted only by its own constitution. For this reason it can assume an aggressive attitude such as would not be possible if it were not self-sufficient. It is extremely doubtful that the federal government would have assumed such sweeping powers and made such inroads on the jurisdiction of the states if it had been obliged to depend upon state officials to carry out its regulations. The experience under the Articles of Confederation certainly indicated the impracticability of such a system. Consequently it might be said that one of the main reasons for the increasing power of the national government is the self-sufficiency and effectiveness of that government.

Perhaps no other single factor has had such a powerful influence in shaping the course of American history as has the presence of an ever-receding frontier. The Americans have been empire builders, continually extending their domain across a vast continent. Unlike most empires, however, the land to the West was virgin territory and was contiguous. It lent itself to settlement and to being transformed from a national domain into states which formed integral parts of the Union.

The westward movement was perhaps conducive to disintegration rather than to unity. The extreme individualism of the pioneer, his abandonment of established usages, his impatience with any restraining authority

other than that of his own creation, his indifference towards national questions in which he felt he had no interest, his pride in local institutions and his exaltation of the state and local governments which he had helped to create, all of these familiar characteristics tended towards decentralization. But the frontier has vanished and the individualism of the frontiersman, while it has left its imprint on our political ideals and national life, is being replaced by a social consciousness of national solidarity.

But the frontier in American history was not solely a disintegrating influence. In it were also the elements conducive to unity. The frontier itself presented a national problem which accentuated the more important national issues. The question of slavery was insistently brought to the foreground by the frontier. Likewise the tariff was advocated by Henry Clay who, as a spokesman for the frontiersman, felt that factories were essential to building up the West. More important as a factor in extending the influence of the federal government along the frontier was the desire of the settlers to have established means of transportation between the West and the Atlantic seaboard which resulted in the encouragement of national projects and concerted efforts on a national scale.

Another factor that has been conducive to centralization is the heterogeneous character of the population that settled along the frontier. People came from all sections of the settled regions of the United States as well as from all the countries of Northwestern Europe. The census of 1890 indicates the cosmopolitan population of some of the western states. In South Dakota sixty per cent of the population was foreign born. In

Wisconsin the percentage of foreign born was seventy-three per cent; in Minnesota it was seventy-five per cent; and in North Dakota it was seventy-nine per cent.² At first glance it would appear that such a medley of different nationalities would be a hindrance to centralization. In our early history it was feared that Pennsylvania, being preëminently German, would form a separate state. It was also considered possible that the German element, by establishing itself in Wisconsin and from there concentrating its colonization to surrounding regions, could lay out an area in which German customs and institutions would prevail and which would be out of sympathy with the rest of the country.³ But the very heterogeneity of our population has assisted rather than retarded centralization. No single element has been so predominant in any region that it has been able to maintain its national life intact for any length of time and all have become amenable to the acceptance of common standards. By association the action and reaction of one group to another has tended to destroy individual national traits and establish a community of interests. The fact that our population has been transplanted to a virgin territory also has facilitated centralized control. Customs and governmental institutions have not had an opportunity to take deep root in a local soil as has been the case in European countries. For this reason it has been easier to establish uniform regulations to which people of all parts of the country must conform without interfering with local institutions of government hallowed by age and tradition.

² F. J. Turner, "The Significance of the Frontier in American History," in *Amer. Hist. Assn. Rept.* (1893), pp. 199-227.

³ *Ibid.*

The principal factors bringing about centralized political control are social and economic rather than political. The nature of modern industrialism with the factory system and the machine process in production is such that uniformity of governmental control becomes expedient. The factory system organizes the whole process of production. The purpose of the factory system is efficiency in production on a large scale. It secures this efficiency by a division of labor. By uniting various kinds of workers, mutually controlling and subjecting them, into a well-disciplined body in a single large establishment where they are provided with an extensive and complex outfit of the machinery of production, the productive capacities of the workers is immensely increased. By a division of labor is secured a system of successive functions and human powers of the most varied kind can be employed simultaneously.⁴

The United States has offered a particularly favorable soil for the development of the factory system. While the system received its initial impetus in England and may be pointed to both as a cause and an outgrowth of the industrial revolution, in no country has it attained the perfection that it has in the United States. The idea of the factory system is to obtain a maximum of production from a minimum expenditure of labor power. Such a system cannot reach a high degree of perfection where labor is plentiful and cheap and where raw products are scarce. But in the United States there has been an abundance of raw products and labor has been relatively scarce and high priced. Hence there has been a tendency to economize on labor by centering production

⁴ See Carl Bücher, *Industrial Evolution*, Trans. by S. Morley Wickett (N. Y., 1900), pp. 173-176.

in large establishments. Another factor, more influential perhaps than the supply of labor in promoting the factory system of production, is the presence of a large market. The factory system does not only mean large scale production, but it means the production on a large scale of a uniform standardized article. This is possible only where there is a large portion of the population with similar tastes and with, what is more important, ability to purchase. A standardized article can be produced and marketed in larger quantities in the United States than in any other country. It is therefore not an accident that the factory system has become more deeply imbedded in American industrial life than it is anywhere else. Large scale production is descriptive of the United States. The clothes we wear, the food we eat, the implements we use, the books we read, and so on *ad infinitum* are mainly factory products. Handicraft is becoming more limited and obsolete. The factory system is becoming more firmly entrenched in our national life.

The factory system has resulted in a localization of industries. Nearness to the market, proximity of raw products, and natural avenues of trade have determined where typical industries shall be located. The steel industries of Gary and Pittsburgh, the automobile industries in Michigan, the manufacture of agricultural implements in Illinois, the packing plants of Chicago, and the flour mills of Minneapolis are typical. Articles of commerce are produced where they can be produced most economically. This localization of industries has made the communities throughout the United States mutually interdependent. Few communities are now self-sufficient. Each produces those commodities which

it is best adapted to produce and depends upon other sections of the country to furnish it with the other commodities that it needs. The failure of any one region is felt by all.

As a result of this mutual interdependence the regulation of commerce must be on broader lines than the states afford. Economic boundaries do not follow political boundaries. Certain regions of the United States are primarily agricultural while others are industrial. Each is dependent on the other for sustenance. These regions do not conform to state lines. If the states would attempt to regulate commerce under such conditions it would tend to retard the transit of commodities from one region to another. The regulating power must have a territorial jurisdiction broad enough to include these different regions if it is to regulate wisely and efficiently. Had there been no clause in the Constitution giving Congress power to regulate interstate commerce, with the advent of the factory system the states would either have had to consent to vesting such a power in the federal government or to agree among themselves upon common terms of regulation and a common administrative agency. When the Constitution was framed the colonial communities were largely self-sufficient and a regulation of interstate commerce was considered of minor importance and supplementary to the power to regulate foreign commerce. The factory system, with its localization of national industries, has made a centralized control of interstate commerce absolutely essential.

The factory system with the economies it is introducing naturally tends to become more widely established. More and more commodities which formerly were pro-

duced in the home are being produced in the factory. The system tends to perpetuate itself. A uniform standard of tastes has been created, and these tastes are satisfied with commodities coming from the factory. New wants are created by skillful advertising, and these in turn are satisfied by factory-made products. To what extent such a system can be carried no one can more than surmise. But it is safe to assume that the more the factory system develops, the more control will be exercised by the federal government over interstate commerce. Will such a control extend to regulating conditions within a factory? Congress sought to do this in the child labor laws. The Supreme Court held this was not a regulation of interstate commerce but was an attempt to reach back and regulate the conditions of labor under which articles intended for interstate commerce were produced.⁵ The Supreme Court, however, has repeatedly declared that Congress may protect the consumer by prohibiting the transit of injurious or fraudulent articles in interstate commerce, and in the child labor case it reconciled its decision with these declarations by saying that products of child labor were legitimate articles of commerce and not injurious *per se*. But in pure food legislation, federal officers are authorized to inspect conditions in plants where food intended for interstate shipment is produced. The question then might arise in connection with the factory system in general: Can the federal government, in carrying out its policy of protecting the consumer, regulate conditions of employment within a factory in the interests of industrial peace on the ground that the products of that factory are needed by consumers in other states? With

⁵ *Hammer v. Dagenhart*, 1918. 247 U. S. 251.

the development of the factory system such a federal regulation is not inconceivable.

The machine process of production is as important as the factory system as a factor which is conducive to centralized governmental control over commerce. The machine process is essentially associated with the factory system, but it would hardly be true to say that the two terms are synonymous. The term "factory system" conveys the idea of an institutionalized industrial establishment. The machine process, as the name implies, is the process whereby production is carried on by the use of mechanical appliances.

The machine process, however, is more comprehensive and less external than a mere aggregation of mechanical appliances in its bearing on human life. In the modern complex of mechanical industry is included practically every form of productive effort. The machine process, by its very nature, tends to make all productive effort interrelated. Professor Veblen has pointed out that the machine process is not made up of a number of isolated processes of production carried on by the use of mechanical appliances.⁶ Each process carried on by the use of a given outfit of mechanical appliances is dependent on other processes. There is thus an endless sequence. The whole concert of industrial operations must be considered as a machine process made up of interlocking detail processes rather than as a multiplicity of mechanical appliances each doing its particular work in severalty. This, as has been indicated by Veblen, requires a constant maintainance or interstitial adjustments.⁷

⁶ Thorstein Veblen, *The Theory of Business Enterprise* (N. Y., 1904), pp. 5-19.

⁷ *Ibid.*

There is an unremitting requirement of quantitative precision with regard to mechanical accuracy and a standardization of grades of materials, tools, units of measurement, etc. In fact the machine process tends to standardize the whole output of a factory.

Conditions in the United States have been especially favorable for the development of the machine process of production. Here it has developed to a point of perfection which it has not attained in other countries where survivals of the handicraft stage of production still persist more tenaciously than in America. Consequently in the United States every basic industry has become more or less dependent on other related industries, and this interrelationship is constantly becoming wider. A strike among a small group of workers in an important industry is apt to precipitate a crisis by throwing the whole system out of gear. This has been especially true with regard to labor engaged in the movement of commerce, with the result that national control has become more necessary in the case of transportation than in other industries.

In the machine process, as in the factory system, industrial boundaries do not follow the geographical boundaries of the states. A detail process in one state may be closely related to other detail processes in different states. The iron mines of Minnesota, the coal fields of Pennsylvania, the steel mills, the steamers on the Great Lakes, and the railroads are all parts of the process of making steel rails. This indicates the inadequacy of state commercial regulations and the necessity of federal control of interstate commerce.

Like the factory system, the machine process possesses elements of self-perpetuation. The products of mechani-

cal appliances obviously must be uniform and standardized. There is not an opportunity to cater to the tastes of the individual consumer as there was under the handicraft system of production. By means of standardization and large quantity production, economies are realized. Consequently an increasing number of commodities are made by machinery. The more the system develops, the closer will become the interdependence of related industries and the greater the need of control by the national government, not only over transportation, but within the industries themselves. It would be difficult to say to what extent this will be carried. The federal government has exercised a power to enjoin railway employees from striking because a strike would impede the transit of interstate shipments.⁸ It has regulated hours of labor and conditions of employment for workers engaged in the movement of interstate commerce, and the Supreme Court has upheld such legislation on the ground that there was a relationship between the regulation and the movement of interstate commerce.⁹ With the development of the machine process and the concomitant establishment of more vital relationships among industries located in different states, there may develop a need for a more vigorous assertion of power by the federal government. It is not inconceivable that a strike of coal miners might tie up the operation of iron mines, steel mills, railroads, and other related industries in different states, and thus indirectly interfere with interstate

⁸ *In re Debs*, 1894. 158 U. S. 564.

⁹ *B. & O. Ry. Co. v. Interstate Com. Com.*, 1911. 221 U. S. 612; *Wilson v. New*, 1917. 243 U. S. 332; *Second Employers' Liability Cases*, 1912. 223 U. S. 1; *Johnson v. Southern Pac. Ry. Co.*, 1904. 196 U. S. 1; *Southern Pac. Ry. Co. v. United States*, 1911. 222 U. S. 20.

commerce. With such a condition prevailing, might not power be granted under the commerce clause enabling Congress to regulate conditions of employment in coal mines on the grounds that promotion of industrial peace in this particular industry bears a close relationship to the movement of interstate commerce? ¹⁰

With modern industrial methods, not only is there an interdependence of agencies of production, but there is a forced integration of all business enterprises. It is becoming more difficult to individualize a commercial enterprise or even to confine it to a given area. Isolation in business obviously is an impossibility. Business means intercourse, and intercourse is facilitated by modern agencies of production and communication. Commercial or financial depression in one region is felt in others. Instances could be cited where a failure in a single business enterprise has precipitated a general crisis. State regulations are necessarily too limited in their application to cope effectively with the problem. There has been a growing need for commercial and financial regulations which are more general in character and uniform in their application. For this reason it has become imperative that the federal government should supervise commercial and financial activities. One has but to consider the activities of such federal agencies as the Federal Reserve Board and the Federal Trade Commission to become convinced of the necessity and importance of centralized regulation of commercial and financial interests. Increasing federal control in industrial, commercial, and financial activities is not an

¹⁰ The Interstate Commerce Commission has recently forbidden the opening of additional coal mines on the ground that sufficient mines were already in operation. *Chicago Tribune*, June 26, 1923.

arbitrary usurpation of power. It is rather the result of the complexities of modern business. Federal control is often the only solution.

While the necessity for national control, especially over transportation, can be accounted for by a consideration of modern industrial methods, it is not so easy to account for the fact that the federal government has assumed a police power in attempting to regulate such practices as lotteries, vice, liquor, child labor, and pure food. Regulations of this kind certainly have not been due to commercial necessity. They have been mainly in the nature of police regulations, and the question might be asked: Why has Congress exercised its powers under the commerce clause to enact such legislation which is only incidental to commerce? Why has it adopted certain standards and sought to impose those standards upon the people of the states?

The fact that social evils have become more subject to governmental regulation may be at least partially accounted for by the development of industrial society and the growth of democracy. One of the political results of the industrial revolution has been the elevation of the middle class to a position of political predominance. The result of this elevation of the middle class has been that the interests of this one element of the body politic has become the ruling factor in formulating state policy. Consequently there has been an exaltation of the middle class virtues of thrift and sobriety, and, since the middle class has been in a position to impress its ideals upon the legislation which it controls, there has been an attempt to discourage habits that might lead to shiftlessness and dissipation. The former paternalistic attitude of indulgence towards a common human

weakness has been abandoned, and such evils as the liquor traffic, gambling, and vice have become subjects of restrictive legislation.

This policy of suppressing social evils has been enhanced by the growth of democracy. With the advance of democracy the legislative policy towards these evils becomes more aggressive. People will conform more readily to restrictive regulations which they feel they have a part in formulating than they will to orders imposed by a political superior over whom they have no control. To use the words of Professor Freund, "Living under free institutions we submit to public regulation and control in ways that would appear inconceivable to the spirit of oriental despotism . . ." ¹¹ Under democratic institutions there is thus a favorable condition politically for the suppression of practices which do not conform to middle class standards of conduct. As a result all of the states have subjected social evils to restrictive legislation.

Congress, then, in attempting legislation of this sort was not breaking new ground. The initiative had already been taken by the various states, and Congress merely followed a trail that had been blazed by the state legislatures. Two reasons might be given for Congress enacting laws which are only incidental to commerce and intended for the repression of social evils. In the first place, it sought in legislation of this kind to give expression to a public opinion that had become quite general towards the repression of certain practices. In the second place, some of this legislation was considered needful to supplement the regulations of the states which could not be effectively enforced without congressional action.

¹¹ *Standards of American Legislation*, p. 21.

Because of the vastness of the country, the heterogeneous character of the population, and the prevailing inequality in the distribution of wealth, it would appear that there were insurmountable barriers obstructing the development of public opinion on a national scale in the United States. However, there are factors that make such a development not only possible but comparatively easy. Viscount Bryce, commenting on the question of public opinion in the United States, says, "Public opinion is on the whole more alert, more vigilant, and more generally active through every class and section of the nation than in any other great State. The Frame of Government has by its very complication served to stimulate the body of the people to observe, to think, and to express themselves on public questions."¹²

While our population is composed of a medley of different nationalities, these nationalities have recently been transplanted to a virgin territory and it has been difficult for distinctive customs and traditions to take deep root in any local soil. For this reason these different nationalities have become more or less amenable to popular suggestions. The machine process has also been a democratizing and nationalizing agency. With its output of standardized commodities it has been conducive to bringing about a uniform standard of living throughout the United States. People consume similar articles in the satisfaction of similar wants. Free and compulsory education, the newspaper, magazines and journals having a national circulation, facilities for transportation and communication, all of these have made association on a national scale possible. Consequently it

¹² James Bryce, *Modern Democracies* (N. Y., 1921), 2 vols., II, p. 112.

has been possible for public opinion on some kinds of morals legislation to develop quite generally throughout the United States. In its attempt at social legislation, Congress has sought to give expression to this public opinion. The constitutionality of such legislation was sometimes questionable, but the popular approval appeared assured. That public opinion is brought to bear directly on Congress in the enactment of legislation for the repression of social evils is shown by the number of resolutions from churches, clubs, colleges, and various associations that are read and inserted in the Congressional Record whenever such legislation is pending.

But legislation of this kind has not merely served to give expression to public opinion. In some cases it was necessary to supplement the regulations of the states by congressional action. For example, it was impossible for the states to enforce their liquor laws without the coöperation of the federal government. By withdrawing the protection that was accorded to the transportation of liquor as a legitimate article of interstate commerce, Congress hoped to give the states a free hand in dealing with the traffic within their borders. Similarly, in the case of food and drug legislation, Congress could deal with the subject more satisfactorily by laying down a uniform standard than could the different states with a variety of standards that might be conflicting. In the regulation of vice and lotteries the states could enact restrictive measures, but it was felt that these evils might be encouraged by having the avenues of interstate commerce open to them. By closing the avenues of interstate commerce to such practices, Congress sought to assist the states in the enforcement of their laws as well as to register its own disapproval of these evils. There was

also the problem that in some states public opinion on certain questions did not correspond to that generally accepted throughout the United States. Such was the case with child labor. Here Congress sought to lay down a uniform standard in those states which were backward with regard to child labor legislation. With the adoption of the Eighteenth Amendment a similar attempt was made to enforce a uniform standard with respect to the liquor traffic.

With the possible exception of the liquor legislation and the child labor laws, on the whole, it can be said that the social legislation attempted by Congress has received popular approval. Liquor legislation has met with a substantial opposition because public opinion in some states had not become mature on the question when the legislation was attempted. The child labor legislation was opposed in some sections because it was looked upon as the entering wedge opening up the whole field of labor legislation to congressional control and because it was not popular locally. Prescribing the proper labeling of foods and drugs intended for interstate transportation appears to be a valid regulation of commerce and within the constitutional powers of Congress. In attempting to repress lotteries and vice it is obvious that the purpose was to discourage disapproved practices and that the regulation of commerce was merely a means to this end. But public opinion in the various states had already registered its disapproval of these practices, and the acts of Congress were looked upon as proper and supplementary to state regulations.

Finally, in attempting to account for the expanding powers of the national government, it should be noted that, relatively speaking, the federal government has

apparently been more successful and less subject to criticism than have the governments of the different states. The functions of the national government in the past have been few, well defined, and, on the whole, have been performed satisfactorily. Moreover, they have been of such a nature that they have not interfered so frequently or so directly with individual rights. The administration of foreign affairs, unless it precipitates a crisis, affects the average individual only as a passing interest. Only on rare occasions has he become interested in currency legislation. By the use of indirect taxes he has been made to contribute toward the support of the national government without ceremony and practically without even noticing that he was being taxed. The mail service has been comparatively efficient and he has accepted it as a matter of course. In the language of Viscount Bryce, "An American may, through a long life, never be reminded of the Federal Government, except when he votes at presidential and congressional elections, buys a package of tobacco bearing the government stamp, lodges a complaint against the post-office, and opens his trunks for a custom-house officer on the pier at New York when he returns from a tour in Europe."¹³ This may be stating the case in too strong terms, but it is important to observe that the federal government has not touched the individual directly in such a number of ways as has the governments of the states and that its work has been creditable. For this reason there has developed a tendency to magnify the efficiency of the federal government, to clothe it with more power, and to give to it additional functions.

¹³ James Bryce, *The American Commonwealth* (3d ed., N. Y., 1907, 2 vols.), I, p. 425.

This tendency to vest more power in the federal government and to impose new duties upon it has probably been enhanced by the notorious inefficiency of our state governments. To the governments of the states has been left the more disagreeable and more difficult task of dealing directly with the individual. The state taxes the individual directly. It prescribes the conditions under which he may work, hire help, hold property, marry, educate his children, make a will, and so on *ad infinitum*; and thus in a number of ways the individual is constantly subjected to state regulations, many of which are irritating. Even if the state government were efficient its task would be a difficult one, and since its shortcomings affect the individual directly they are noticed more and criticised more severely.

Because of the relative efficiency of the federal government, as compared with the governments of the states, there seems to be a tendency to hand difficult problems over to the federal government. Is such a program expedient and wise? By increasing the functions of the federal government will it tend to bring about an enforcement of laws which the states have been unable to enforce successfully, or will it, by burdening the national government with these additional matters, tend to reduce its efficiency to the level of that of the states? Will a centralized system of government have a due regard for the rights of the states to determine policies which in their judgment are best suited to meet local needs, or will it tend to disregard local interests and thus make possible a tyranny of the majority? Will it keep awake an interest in government, or will it dampen such an interest by removing the government too far from the governed?

These are questions which should challenge the attention of legislators and reformers who are actuated by a desire to realize the enactment and enforcement of their cherished policies by the federal government because the states have apparently been unwilling or unable to bring about the reforms. It should be remembered that there are reforms which are apt to necessitate remedies and create conditions which are less desirable than the evil which the reform purports to correct. Endangering the efficiency of the national government by assigning to it tasks which inherently lend themselves to state and local supervision is a big price to pay for the realization of a reform. The national government, after all, is a human institution with its imperfections and its limitations. It is easier to influence Congress than to convince forty-eight state legislatures to enact social legislation. It is not so difficult to secure federal legislation as it is to create a public opinion in favor of a reform in forty-eight states. A reform, however, is not necessarily attained when a congressional enactment is passed. It is never attained until it has the support of public opinion in the areas where it is to be applied. For this reason reformers should seriously consider whether federal action or state action is the better method of realizing a reform. The problem of inherent possibilities and limitations of federal and state regulation has certainly not received the consideration that it warrants.

CHAPTER XVIII

CONSTITUTIONAL POSSIBILITIES FOR CENTRALIZATION

IN a Wisconsin decision¹ the court gave a lucid expression to the difficulties presenting themselves to governments founded upon written constitutions. In this case Chief Justice Winslow, speaking for the court, upholding a Wisconsin workmen's compensation act upon an "elective" insurance plan, said, "A Constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social, and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the Constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress."² The Chief Justice then applied these principles to the testing of the constitutionality of a statute: "Where there is no express command or prohibition, but only general language or policy to be con-

¹ *Borgnis v. Falk Co.*, 1911. 147 Wis. 327.

² *Ibid.*, at 348-9.

sidered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideas of the time, as well as the problems which the changes have produced, must also logically enter into the considerations, and become influential factors in the settlement of problems of construction and interpretation.”³

A similar view was taken by the United States Supreme Court in the *Debs* Case.⁴ The court here said, “Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation.”⁵

Such opinions contemplate a constitution as a living instrument rather than as an archaic document in danger of becoming obsolete. The language of the Constitution remains fixed. The concepts mean the same, but the facts and conditions to which they apply are subject to constant and vital changes with the necessary effect that the application of the old concepts to new situations bring new and different results. This is due to the change in conditions, and not to any change in concepts. The framers of the Constitution of the United States may, and probably did, have in mind a particular set of problems to which the language of such provisions as the commerce clause was applicable. But these problems no longer press for solution. They have been enlarged or replaced by more complicated problems which have arisen out of the complexities of modern life. The framers of a constitution may build better than they know when they attempt to formulate organic

³ *Borgnis v. Falk Co.*, 1911. 147 Wis. 327, at 349-350.

⁴ *In re Debs*, 1895. 158 U. S. 564.

⁵ *Ibid.*, at 591.

law. A clause intended to remedy difficulties existing when the Constitution was framed may be found necessary to regulate modern commercial activities, and must be construed in the light of the present rather than in the light of the past.

A comparison of the powers to be exercised by Congress under the commerce clause, as contemplated by the fathers, with those exercised at present by the central government under the same constitutional provision, would indicate the growing influence of the federal government. The framers of the Constitution were mainly concerned with preserving the benefits of foreign commerce to the regions which did not enjoy harbor facilities against the possible extortions of seaboard states. The colonial communities were self-sufficient and therefore interstate trade was reduced to a minimum. What little interstate commerce there was was carried on by means of wagons and small river and canal craft. Obviously such commerce needed little or no regulation by the central government. It has been noted how interstate commerce has reached gigantic proportions and how consequently it has called for an increasing amount of regulation by the national government. The federal government has laid down rules under which business organizations may carry on their business; it has minutely regulated the activities of common carriers with reference to rates, business practices, equipment, and relations between operators and employees; by forbidding combinations in restraint of trade and applying this prohibition to labor organizations, it has made the activities of organized labor subject to federal control; finally, it has gone into the field of police and has sought to regulate the liquor traffic, lotteries, vice, food and drugs, and child labor. Beyond and above the governments of the

local units and the states stands the government of the United States like a Leviathan reaching out and exercising an increasing authority. This extension of federal activities has not come about because of a disregard for the rights of the states or because of a desire on the part of the central government to usurp. A centralized control over a number of activities has been made necessary because of the complexities of modern life. During our early history commerce was mainly local. It is now largely interstate. Consequently in the exercise of its powers conferred by the commerce clause the federal government regulates a greater number of activities.

Some light may be thrown upon the question of the extent of federal power by a consideration of the attitude of the framers of the Constitution. Practically all of the members of the Convention favored the preservation of the individualities of the states and the reservation to the states of a certain sphere of independence. Madison notes that "One gentleman alone [Col. Hamilton] . . . boldly and decisively contended for an abolition of the State Governments."⁶ Those who favored the New Jersey Plan, such as Dr. Johnson, contended that this plan was "calculated to preserve the individuality of the States" while "The plan for Virginia did not profess to destroy this individuality altogether; but it was charged with such a tendency."⁷

Since the Virginia plan was the basis for discussion in

⁶ *Madison Papers*, II, p. 921. The argument of Alexander Hamilton for the abolition of state governments was made in the heat of debate over the New Jersey Plan. Later in the plan of government submitted by Hamilton the states were recognized as geographical and political units but were made entirely subservient to the federal government. See *Madison Papers*, II, pp. 878 *et seq.*

⁷ *Ibid.*, p. 920.

the convention it may be pertinent to consider the attitude of its defenders towards the question of federal power. After commenting upon the remarks of the opponents of this plan, Madison notes that "Mr. Wilson and the gentleman from Virginia, who were also adversaries of the plan of New Jersey, held a different language. They wished to leave the States in possession of a considerable, though a subordinate, jurisdiction."⁸

The advocates of the Virginia plan, the leaders of whom were James Wilson and Madison, were primarily interested in establishing a strong and independent central government. Both Wilson and Madison felt that there was more danger of the states encroaching upon the federal government than of the federal government encroaching upon the states. They were anxious to secure the federal government in the exercise of its powers and felt that after this had been accomplished the subsequent division of governmental powers and functions between the federal government and the states would be wisely and agreeably adjusted in the light of future experience. The views of Madison on the question of division of powers were clearly and forcefully stated on the floor of the convention and, since they indicate the attitude of a considerable number, if not a majority, in the convention, liberty has been taken here to insert them somewhat at length. Madison stated that he was of the opinion "... in the first place, that there was less danger of encroachment from the General Government than from the State Governments; and in the second place, that the mischiefs from encroachments would be less fatal if made by the former, than if made by the latter."

⁸ *Madison Papers*, II, p. 921.

1. All the examples of other confederies prove the greater tendency, in such systems, to anarchy than to tyranny; to a disobedience of the members, than usurpations of the Federal head. Our own experience had fully illustrated this tendency. But it will be said, that the proposed change in the principles and form of the Union will vary the tendency; that the General Government will have real and greater powers, and will be derived, in one branch at least, from the people, not from the Governments of the States. To give full force to this objection, let it be supposed for a moment that indefinite power should be given to the General Legislature — why should it follow that the General Government would take from the States any branch of their power as far as its operation was beneficial, and its continuance desirable to the people? In some of the States, particularly in Connecticut, all the townships are incorporated, and have a certain limited jurisdiction, — have the representatives of the people of the townships in the Legislatures of the State ever endeavored to despoil the townships of any part of their local authority? As far as this local authority is convenient to the people, they are attached to it; and their representatives, chosen by and amenable to them, naturally respect their attachment to this, as much as their attachment to any other rights or interest. The relation of a General Government to State Governments is parallel.

2. Guards were more necessary against encroachments of the State Governments on the General Government, than of the latter on the former. The great objection made against an abolition of the State Governments was, that the General Government could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions. The objection as stated lay not against the probable abuse of the general power, but against the imperfect use that could be made of it throughout so great an extent of country, and over so great a variety of objects. As far as its operation would be practicable, it could not in this view be improper;

as far as it would be impracticable, the convenience of the General Government itself would concur with that of the people in the maintenance of subordinate governments. Were it practicable for the General Government to extend its care to every requisite object without the coöperation of the State Governments, the people would not be less free as members of one great Republic, than as members of thirteen small ones. A citizen of Delaware was not more free than a citizen of Virginia; nor would either be more free than a citizen of America. Supposing, therefore, a tendency in the General Government to absorb the State Governments, no *fatal* consequence could result. Taking the reverse as the supposition, that a tendency should be left in the State Governments towards an independence of the General Government, and the gloomy consequences need not be pointed out. The inauguration of them must have suggested to the States the experiment we are now making, to prevent the calamity, and must have formed the chief motive with those present to undertake the arduous task.⁹

With such views prevailing among the more influential men of the Convention it is reasonable to conclude that, in clothing the federal government with the power to regulate foreign and interstate commerce, the framers of the Constitution intended to vest it with a positive power. Their concepts of commerce, of course, were limited by the conditions prevailing at the time. They could not contemplate the railways, steamboats, telegraph or air craft. But they intended that the federal government should control the movement of commodities from foreign countries into the United States or among the several states. The idea was to secure such commerce against state interference. The changing means of

⁹ *Madison Papers*, II, pp. 923-925.

transportation would influence the scope of the power, but the purpose would remain fundamentally the same.

But while such a power as that granted by the commerce clause was intended as a positive power, it is after all only a single enumerated power. It is not a blanket provision. And even if we consider it as a latent power to be called forth when needed, we must realize that it is circumscribed by certain constitutional limitations. In general it can be said that the limitations on federal legislation are threefold:

(1) Such legislation must be based upon an enumerated power. There are instances when Congress has sought to make regulations which could not be authorized by any of its enumerated constitutional powers. Thus in 1867 a law was enacted forbidding the sale of illuminating oil below a certain fire test.¹⁰ This law was declared unconstitutional by the Supreme Court on the grounds that the regulation was purely one of police and that Congress was not empowered to pass a regulation of this kind.¹¹ For the same reason an act of 1876 punishing the counterfeiting of trade-marks¹² was declared unconstitutional.¹³

(2) There must be a real relevancy between the regulation attempted and the enumerated power. The courts will usually not inquire into the motives of the legislature to determine whether the purpose of an act is regulation of commerce or police, but if the act is passed as a regulation of commerce it must at least be incidental to commerce. In the case of the child labor legislation the court held there was not sufficient relevancy between the object sought and the regulation of interstate commerce.¹⁴

¹⁰ 14 Stat. at L. 434.

¹¹ *United States v. Dewitt*, 1870. 9 Wall. 41.

¹² 19 Stat. at L. 141.

¹³ *Trademark Cases*, 1879. 100 U. S. 82.

¹⁴ *Hammer v. Dagenhart*, 1918. 247 U. S. 251.

(3) Finally, there are limitations contained in the Constitution itself, such as the Fifth Amendment forbidding confiscatory legislation, or the taking of property without due process of law. Thus an act forbidding a carrier from discharging or discriminating against an employee because of his membership in a labor union was held to be a violation of the constitutional rights of the employer by compelling him against his will to retain a person in his service.¹⁵

But in spite of these limitations the federal government possesses power to legislate on a large number of subjects, as is shown by the amount of police regulations that have been enacted by Congress. The commerce clause furnishes a convenient constitutional peg on which to hang such legislation. Because of the complex ramifications of modern commerce and industry, it is easier to establish a relevancy of police regulations to the commerce clause than to provisions which are more specific and limited in their application. The commerce clause lends itself readily as a constitutional justification for legislation on sundry related matters. Because of a development of a closer relationship between different kinds of human activity, more incidental regulations may be associated with a regulation of commerce. For this reason there has been an expansion of federal activities through the commerce clause, and with a growing demand for federal regulation, there are possibilities for even further expansion. These possibilities for further expansion may be indicated by citing certain cases.

First, it should be noted that the scope of federal regulation may be increased without the purpose of the regulation varying greatly from that contemplated by

¹⁵ *Adair v. United States*, 1908. 208 U. S. 161.

the framers of the Constitution. This may be illustrated by the changing policy towards railroad rates. The framers of the Constitution undoubtedly had in mind that Congress should regulate interstate traffic in order that commerce among the states might not be discouraged by adverse state legislation. But they could not be expected to foresee that, with the development of railroads, such a policy could only be carried out by interfering with the power of the states to fix rates on purely intrastate shipments as was done in the Shreveport case.¹⁶ Still if the federal government would not have power to interfere in such an emergency, interstate commerce would be discriminated against, and a condition would be created such as the fathers sought to avoid by placing the regulating power in Congress. A new situation had arisen and Congress had to resort to new methods. The methods probably were not contemplated by the framers of the Constitution, but the purpose of Congress, namely, to defend interstate commerce against adverse state laws was the same as that motivating the Federal Convention when it vested Congress with power to regulate interstate commerce. A more extreme case of federal interference with the powers of the states than the Shreveport case is the case of *Western Union Telegraph Company v. Kansas*.¹⁷ Here the Supreme Court held that a state could not impose arbitrary terms upon a foreign corporation engaged in interstate commerce as a condition to its continuing to do a local business within the state when such terms materially affected or burdened its interstate business. It is an old legal principle that a state can exclude a foreign corporation from doing local

¹⁶ *Houston Ry. Co. v. United States*, 1914. 234 U. S. 342.

¹⁷ 216 U. S. 1. 1910.

business within its borders, and what it can exclude it may admit on hard terms. In the *Western Union* case, Justice White, in a concurring opinion, took the view that after a state had permitted a foreign corporation to establish itself in the state at a considerable expense, the state was estopped from imposing unreasonable terms which would be confiscatory and contrary to due process. Such a view would furnish a basis for reconciling the holding in this case with the earlier opinions expressed in the insurance cases.¹⁸ But this view is irreconcilable with the idea of a state having absolute power to prescribe the conditions under which a foreign corporation may engage in a local business. The majority opinion in the *Western Union* case drew a distinction between imposing conditions upon insurance companies and upon corporations engaged in interstate commerce. From this we can only draw the conclusion that if a foreign corporation is engaged mainly in interstate commerce the power of a state to deal with it becomes modified. The regulations imposed by the state must then be within the bounds of reason. It does not seem probable that the framers of the Constitution contemplated such a curtailment of the power of a state to prescribe conditions under which a foreign corporation could come in and do a purely local business. But neither did they contemplate the telegraph and railroads. It may be significant that, with the development of modern transportation and communication, it is becoming more difficult to distinguish between what is purely local and what is interstate business. Unreasonable restraints imposed upon a corporation engaged in interstate commerce, such as a telegraph company, in the conduct of a local business, may seriously

¹⁸ For a discussion of these cases, see Chap. XIV.

interfere with the interstate commerce of such a corporation. Consequently in its efforts to protect interstate commerce from being hampered by adverse state regulations—a purpose contemplated by the fathers—the federal government restricts a state from dealing arbitrarily with a subject over which technically the state has absolute control. If the foreign corporation, doing a local business, is engaged in interstate commerce, the control of the state over the local business is subject to the condition that it must not unduly burden interstate commerce. In the *Shreveport Case* the court held that a state, in regulating intrastate rates, could not fix rates which discriminated against interstate commerce. In the *Western Union Case* it was held that in dealing with foreign corporations engaged in interstate commerce, a state could not lay down terms, as a condition to their doing a local business, which might burden their interstate business. This may appear as a curtailment of the power of the states to deal with local matters. But under the Constitution they have never been entirely free to deal with such matters. They have been restricted if the regulation interfered with interstate commerce. What has happened is that interstate and intrastate commerce have become more closely related, and in dealing with a local matter the state is now more apt to interfere with interstate commerce.¹⁹

Other notable examples of the possibilities for further federal expansion may be drawn from the legislation against disapproved practices such as regulation of lotteries, vice, food and drugs, and intoxicating liquor.

¹⁹ In the recent case of *Terral v. Burke Construction Company*, 1922, 42 Sup. Ct. 188, it was held that a state is not absolutely free in dealing with a foreign corporation even though it is not engaged in interstate commerce. See Chap. XIV.

The debates in Congress indicate that the purpose in enacting such laws was not to regulate commerce but to make police regulations, and that regulation of commerce was merely a means to an end. A number of examples could be given to indicate the possibilities of expansion of federal power by means of legislating by indirection. In the case of vice the Supreme Court has held that the regulation of the federal government forbade immoral practices even when no commercial or mercenary motives were in evidence.²⁰ In the regulation of liquor it was held that the federal government might prohibit the shipment of liquor for personal use into a state where the personal use of liquor was tolerated, and the Supreme Court intimated through dicta that Congress could have excluded intoxicating liquor from interstate commerce as it had done with lottery tickets.²¹ While these regulations may appear to be a departure from the intentions of the framers of the Constitution, this is not necessarily true. There were members in the Constitutional Convention, the most notable perhaps being James Wilson, who took the view that there should be no twilight zone between the federal government and the states where neither would have jurisdiction, but that in matters over which the states did not have jurisdiction the federal government must assume control.²² The states have no jurisdiction over goods in transit in interstate commerce. Consequently Congress may exclude goods which it deems to be injurious or liable to encourage fraudulent practices. It is questionable if Congress even during the early years of

²⁰ *Caminetti v. United States*, 1917. 242 U. S. 470.

²¹ *United States v. Hill*, 1919. 248 U. S. 420.

²² See James Wilson's Address to the Pennsylvania Convention, *Elliot's Debates*, II, pp. 418 *et seq.*

the Republic could not have discouraged certain practices through its power to regulate commerce. The slave trade was specifically protected because it was considered possible that Congress might interfere with it through its taxing power and power to regulate commerce.²³

The child labor legislation is perhaps the clearest example of congressional legislation which in effect would have practically amounted to a usurpation of state powers by the federal government. While this law as a commerce regulation was declared unconstitutional,²⁴ the decision was handed down by a divided court, four judges dissenting. Professional opinion throughout the country also was divided on the question of the constitutionality of such a measure.²⁵ Because of the division of opinion with regard to its constitutionality and because of subsequent legislation seeking to attain the same end through the taxing power, the child labor law merits consideration here as an example of the possibilities for expanding federal power through indirect legislation.

The first child labor law sought to exclude from interstate commerce the products of certain industries where children were employed under certain conditions. The distinction between this law and such legislation as the pure food and drug act has been clearly drawn by Chief Justice Taft: "Bills have been urged upon Congress to forbid interstate commerce in goods made by child

²³ *Constitution*, Art. I, sec. 9:1; Art. V.

²⁴ *Hammer v. Dagenhart*, 1918. 247 U. S. 251.

²⁵ For an excellent summary of the arguments both pro and con on the question of the constitutionality of a Federal child labor law, see R. E. Cushman, "National Police Power Under the Commerce Clause of the Constitution," in *Minnesota Law Review*, III (1919), pp. 452-483; also H. Hull and T. J. Parkinson, "Constitutionality of the Federal Child Labor Law," in *Political Science Quarterly*, III (1916), pp. 519-540.

labor. Such proposed legislation has failed chiefly because it was thought beyond the Federal power. The distinction between the power exercised in enacting the pure food bill and that which would have been necessary in the case of the child labor bill is that Congress in the former is only preventing interstate commerce from being a vehicle for conveyance of something which would be injurious to people at its destination, and it might properly decline to permit the use of interstate commerce for that detrimental result. In the latter case, Congress would be using its regulative power of interstate commerce not to effect any result of interstate commerce. Articles made by child labor are presumably as good and useful as articles made by adults. The proposed law is to be enforced to discourage the making of articles by child labor in the state from which the articles were shipped. In other words, it seeks indirectly and by duress, to compel the states to pass a certain kind of legislation that is completely within their discretion to enact or not. Child labor in the State of the shipment has no legitimate or germane relation to the interstate commerce of which the goods thus made are to form a part, to its character or to its effect. Such an attempt of Congress to use its power of regulating such commerce to suppress the use of child labor in the State of shipment would be a clear usurpation of that State's rights."²⁶

The majority opinion in the Supreme Court was similar to that expressed by Mr. Taft. The act was declared unconstitutional because it was not considered a regulation of commerce and because it was a usurpation of state powers. Justice Holmes, however, delivered a vigorous dissenting opinion in which he took the view

²⁶ *Popular Government*, pp. 142-3.

that, "The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."²⁷

Since this opinion was concurred in by three other justices, and since it voiced the sentiments of many students of constitutional law it merits consideration. This act sought to reach back to the source of production and regulate conditions of employment in places where articles intended for interstate commerce were produced. If the conditions of employment did not come up to the standards fixed by Congress legitimate articles of commerce would be excluded from interstate commerce. To admit that Congress has power to enact such measures would be to admit that the independence of the

²⁷ *Hammer v. Dagenhart*, 1918. 247 U. S. 251, at 281.

states to make police regulations is practically at an end. Congress would be limited only by restrictions contained in the Constitution itself, such as the due process clause. The regulations would not need to be limited to the employment of children, but could be extended so as to include all labor in factories, mines, quarries, forests, on farms, and so on *ad infinitum*. Congress could then regulate hours of labor, working conditions in mines and factories, health and safety insurance, vocational education, minimum wages, and methods of wage payment. In fact, it could stipulate the conditions that should prevail on the farm and in the factory, and if these conditions did not exist the goods produced there would be excluded from interstate commerce.

It is not difficult to imagine the enormous powers that would be given to Congress and the serious diminution of state powers that would follow if it were admitted that Congress had powers under the commerce clause to enact the first child labor law. The majority of the court, in holding the act unconstitutional, were conscious of this as is shown by the conclusion to the opinion where the court said, "If Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."²⁸ A similar view was taken by the court in holding invalid the legislation which sought to regulate child labor by invoking the taxing power.²⁹

It is in legislation like the child labor laws that

²⁸ *Hammer v. Dagenhart*, 1918. 247 U. S. 251, at 276.

²⁹ *Bailey v. Drexel Furniture Company*, 1922, 66 L. Ed. 522. See Chaps. IV, VIII.

Congress, in the guise of exercising one of its delegated powers, might extend its control to matters that are purely local in character and over which the states historically have had exclusive jurisdiction. If Congress could set up its own standard, as against those of the states, and exclude legitimate articles from interstate commerce unless these standards were accepted in the states, it is difficult to see how any powers of the states would be secure against federal interference. With the development of modern commerce and industry every section of the country has become dependent on other sections. Consequently an overwhelming proportion of the commerce of the nation is of an interstate nature. If Congress could determine what shall be the subject of such commerce it would have a tremendously effective weapon with which it could enforce its regulations in practically every field of human activity. It would be limited only by such provisions as the due process clause. It might establish a uniform system of conveyancing of property, a uniform system of education, or uniform divorce laws, and enforce its rules by excluding the persons concerned or their goods from interstate commerce. For example, Congress might establish uniform grounds for divorce and prevent any couple who had been legally separated from traveling or shipping goods in interstate commerce if the divorce laws in the state where the separation had taken place did not measure up to the standard fixed by Congress. It is difficult to see to what extent Congress, in the guise of regulating interstate commerce, could go if the opinion of Justice Holmes were accepted. It could practically regulate everything that the states are now regulating. This would amount to a destruction of federalism. The states

would be reduced to impotence and what powers they exercised would be exercised by sufferance.

In the child labor legislation Congress, in the guise of exercising an enumerated power, sought by indirection to effect regulations covering a subject over which it had no constitutional control. The Supreme Court held that there was not sufficient relevancy between the regulation attempted and the constitutional power delegated to Congress and that such legislation was inimical to our federal system of government. But even in the child labor legislation Congress at least sought a constitutional justification such as the taxing clause and the commerce clause for the attempted regulation. It is difficult to find any specific grant of power authorizing Congress to enact federal grants legislation for the promotion of interests over which the federal government has no direct control. Still the extension of federal aid to the states with provisos attached to the grants may furnish an unlimited field for the expansion of federal activities.³⁰ A strict constructionist might plausibly urge that the donation of federal funds for such purposes as the promotion of education and public health is unconstitutional. There is an absence of constitutional pegs upon which to hang such legislation. But here again historical research might reveal that the fathers were not inimical to legislation of this kind and did not consider it contrary to the constitution which they had drafted. Washington apparently favored federal aid for educational purposes. However, it is not necessary here to review again a subject which is considered in a previous chapter.³¹ But it

³⁰ For a discussion of the operation of federal grants legislation, see Chap. IX.

³¹ Chap. IX.

is important in this connection to note again the possibilities for federal expansion afforded by such legislation. Congress might set up certain standards which the states would have to meet before they could become the recipients of federal aid. It might be urged that there would have to be a relevancy between such congressional standards and the purposes for which the aid was to be granted. But such a relevancy might be found and still leave room for sweeping congressional regulations. For example, Congress might demand that a state must adopt and enforce certain standards regarding child labor before it could receive the federal grant for educational purposes, or that certain standards with regard to marriage and divorce must apply in a state before the state could profit by the federal grants for the promotion of public health. A state could, of course, reject the federal offer, but federal aid is a temptation to a hard-pressed state legislature, and by offering rewards to the states that conformed with federal standards, Congress might use the state legislatures as agents to effect sweeping regulations in matters over which the central government has no direct control.

Some writers have viewed the growth of federal power as a necessary development.³² Others have looked upon it as an unwarrantable usurpation.³³ Whether or not Congress has exceeded its constitutional bounds in regulating matters which traditionally have belonged to the states is a judicial question for the courts to decide. There is little to be gained by asserting that the growth of federal activities is an unconstitutional usurpation of

³² See H. L. West, *Federal Power: Its Growth and Necessity*, N. Y., 1918.

³³ Franklin Pierce, *Federal Usurpation*, N. Y., 1908.

power. A consideration of the Constitution as a living instrument suitable for present day needs, such as we have attempted in the present chapter, instead of showing that the federal government is rigidly circumscribed by hard and fast constitutional provisions, is rather apt to convince one that the central government has not exceeded its constitutional grant of power but could even go further than it has in the past and still remain within its constitutional limitations. The courts dating back to Chief Justice Marshall have been liberal in construing federal power. Only when enactments have threatened to overturn the federal system, such as the child labor laws, have the courts called a halt. But that Congress by judicial interpretation is vested with regulatory powers over matters which formerly have been left to the states does not necessarily mean that it is wise for the central government to exercise these powers to their full extent. Additional power may be granted to Congress by constitutional amendments, but this also may be imprudent. There are inherent limitations as well as constitutional restrictions to federal centralization. Limitations which inhere in human nature and established society, though frequently ignored by students of government, are obviously more important than are the artificial restrictions imposed by constitutional provisions. It is the purpose of the concluding chapter to indicate some of these inherent limitations to federal centralization.

CHAPTER XIX

HAZARDS OF CENTRALIZATION

ANY consideration regarding the wisdom of centralization must necessarily go beyond the mere question of constitutional construction. A written constitution is intended to promote rather than inhibit an orderly development. In it are laid down fundamental principles and a framework of government under which it is intended that individuals and groups may realize a more free development of their individualities in various lines of useful effort. If this can be done better under a system of centralized control such a system will naturally justify itself in a democracy. Simply to plead an unconstitutional usurpation of power by citing the Tenth Amendment is not a sufficient justification for attempting to arrest the tendency towards centralization. Constitutions like governments and other institutions are living things. They are not dead documents. One generation cannot bind the future with the written word. In the language of Professor Ross, "A society can be so pleased with its institutions that it suffers no willed change — like the Greek city-state which decreed death to any citizen who should propose to alter its constitution — but it cannot avert social evolution. Hence, it had better leave the door open to changes which adapt institutions to the new situations which social evolution has brought." ¹

¹ Edward A. Ross, *Principles of Sociology* (New York, 1920), p. 527.

The commerce clause has been the principal constitutional provision by which the increasing exercise of federal power has been justified. It is not so important to test whether this clause has been too liberally interpreted from the standpoint of statutory construction as it is to consider whether or not, with a liberal interpretation, the consequent expansion of federal authority is politic and wise when viewed in the light of human experience. Adherents of the State's Rights School are wont to quote the Tenth Amendment as a vindication of their position. Such general constitutional provisions as the Tenth Amendment are of immense value as a statement of the nature of our system of government, but if the Constitution, of which they form a part, is not considered as a living agency, they become mere fetish with a social significance similar to that of totems or taboos. To what extent the national government is limited by such provisions as the Tenth Amendment is a judicial question and the courts must determine this. The social and economic significance of centralization of governmental functions is more than a judicial question. The question whether or not centralization is expedient and wise is as important as the question whether or not it is constitutional. The wisdom of a policy of centralization is a legislative rather than a judicial problem. It involves a consideration of the nature of the federal power and the possibilities for further expansion, the difficulty of legislating by indirection, the question of legislative and administrative areas, the determination of what interests are essentially national and what matters can be more advantageously handled by local units of government, and the effects of centralization upon the relations of the people to their government. Such a con-

sideration necessarily leads one away from a study of constitutional provisions in their legal aspects to a contemplation of some of the general problems of federalism. Obviously, it is not to be hoped that these problems can be solved in a brief discussion such as this. They are of such a nature that they do not admit of accurate solutions. However, some lines of thought may be indicated here which may be helpful not as a solution of the problem of federalism, but rather as an attempt to point out some of the difficulties that present themselves in a government like ours.

The question of centralization and decentralization of governmental functions is one that is at present confronting every large state. In the United States, however, due to our peculiar dual system of control, it becomes of special interest. The very nature of a federal power such as the power to regulate commerce presents a serious difficulty. While it permits a certain degree of federal control it is after all a specific, enumerated power. But since, like the taxing power, it is general in its application, it has furnished a convenient constitutional peg on which to hang incidental regulations. This leads to legislation by indirection, a practice which is resorted to under systems of limited powers. It often happens in the United States that a generally desired object can be attained only by indirection. Thus the taxing power and the power to regulate commerce have been resorted to for the purpose of accomplishing objects not otherwise within the legislative power of Congress. Professor Freund notes that "in the last instance of this kind, the suppression of the white phosphorus match industry by a prohibitive tax, there was no pretense that the law was

in any sense a revenue measure.”² Likewise in legislating, in the guise of regulating commerce, on such subjects as lotteries, vice, and child labor, the members of Congress clearly indicated during the debates that the purpose of the legislation was to stamp out an evil and that regulation of commerce was merely a means of accomplishing this. However, a constructive legislative policy can hardly be expected to develop under such conditions. To use again the words of Professor Freund, “A legislative policy can hardly be worked out in a satisfactory manner if it has to sail under a false flag.”³

Legislation by indirection is sometimes resorted to in the states when objects are pursued ostensibly upon the well-established grounds of the police power because the real purpose is in advance of prevailing ideas of what the state should attempt, though it is conceded that the object is generally desirable. Regulations attacking bill boards upon the grounds of safety or fixing maximum hours of labor upon the grounds of public health are illustrations of this sort of legislation. However, in the states it is a case of standards which have not yet matured, and it is only a question of time until the new standard will openly assert itself and will not have to be paraded under a false flag. The states, in social legislation, are limited only by such a vague restriction as that contained in due process of law provisions. Consequently the states are more free than Congress from constitutional restraints in their attempts to formulate a constructive legislative policy.

The federal government does not enjoy freedom in the enactment of social and economic legislation. There

² *Standards of American Legislation*, p. 103.

³ *Ibid.*, p. 104.

must be a reasonable relevancy between what it attempts to accomplish and the constitutional grant of power by which it seeks to attain the desired end. For this reason it cannot adopt a comprehensive, constructive legislative program in dealing with subjects incidentally related to commerce or taxation. More significant than that there has been an expansion of federal activities is that this centralization has been in the main unthinking and planless. In regulating business combinations and railroads there has been an attempt to develop a constructive legislative policy, and by a process of trial and error to arrive at methods conformable to what might be termed legislative principles. Outside of this, Congress has not developed any constructive standards in dealing with measures that are only incidental to commerce. The regulations usually have been unrelated and have not formed parts of a unified constructive program.

Similarly in administration there has not been developed a constructive program except in dealing with matters that have a direct bearing on interstate commerce such as the railroads and business combinations. By such an administrative agency as the Federal Trade Commission an opportunity is furnished for expert study to determine whether business practices are harmful in that they attempt to thwart honest competition or beneficial in that they seek to introduce economies. As a result rash and unwise regulations may be avoided. The Interstate Commerce Commission performs a similar function with regard to the railroads. But in the regulation of matters which are only incidental to commerce it is difficult to see how a constructive administrative policy could be formulated. Comprehensive governmental powers are lacking. Consequently

the legislation has amounted to a refusal to lend the agencies of interstate commerce to the furtherance of certain practices, or prohibitive taxes have been levied. Such a policy is negative rather than positive. And negative or prohibitory legislation requires little or no constructive administration.

However, while it is important to consider that, due to constitutional limitations, it is difficult to work out a constructive legislative policy, it is perhaps more important to note that, even in the absence of constitutional restrictions, a large state cannot pursue a policy of centralization without encountering serious difficulties. The question of legislative and administrative convenience is apt to be as cogent as the question of constitutional limitations. English scholars influenced by John Austin ⁴ and Professor Dicey ⁵ are apt to consider American legislatures, hedged in by restrictive constitutional provisions, as law-making bodies with powers similar to those of a quasi-public corporation. Contrasted with the unrestricted British Parliament, American legislatures appear to be unduly circumscribed. But is Parliament unrestricted? Mr. Laski observes that "When the South African Parliament forbade the admission of Indians to the Transvaal, Great Britain felt that a grave injustice had been inflicted on a meritorious section of its subjects; but Great Britain did not dare, despite the theoretical sovereignty of its legislature, to repair the injustice so inflicted. When Lord Grey tried, in 1849-1850, to turn the Cape of Good Hope into a penal colony, he was compelled, despite the delegation to him of sovereign power, to desist. Lord Brougham caused the judi-

⁴ *The Province of Jurisprudence Determined* (London, 1832).

⁵ Albert V. Dicey, *Law of the Constitution* (London, 1915).

cial Committee of the Privy Council to be created the supreme tribunal in ecclesiastical cases; but it is notorious that churchmen have refused to accept its decisions as binding in spiritual matters. Sir James Graham, in 1843, took the legally admirable ground that if the courts upheld the right of lay entry into patronage in the Scottish Church he must uphold their decision in Parliament; but that legal rectitude did not prevent Dr. Chalmers and his colleagues disrupting the Church to emphasize their dissent. In a more recent time, when the Welsh miners struck in complete defiance of the provisions of the Munitions Act, it was found simply impossible to enforce its penalties. The American Revolution was, on the English side, an experiment in applied Austinianism. It is surely obvious that a sovereignty so abstract is practically without utility.”⁶ The instances pointed out by Mr. Laski show that, even though a legislative body is unlimited constitutionally, it cannot legislate arbitrarily over vast areas and regulate innumerable and conflicting interests.

This brings us to a consideration of legislative areas, a consideration which contemplates, not only the possible range of human interests and activities which may wisely be made subject to legislative control, but the extent of territory over which such a control may feasibly be established. The location of final authority in a federal system, such as ours, has proved a stumbling block to many students of political science. De Tocqueville⁷ rather placidly accepted the interpretation in vogue at the time he made his observations that the

⁶ Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven, 1917), p. 269.

⁷ Alexis De Tocqueville, *La Démocratie en Amérique* (2 vols., Paris, 1835).

states had sovereign powers over some things and that the federal government had final authority over others. This theory of a divided sovereignty was especially acceptable to German scholars who were anxious to consolidate the minor German states and who consequently advanced the theory of a *Bundesstaat*.⁸ Other observers, such as Professor Dicey, have contended that federalism is merely a temporary experiment which will necessarily gravitate towards a centralized control. But judging from recent developments throughout the world, one must note that the movement is not entirely towards centralization but that there is also, in many quarters, an earnest protest against this tendency and a plea for decentralization of legislative and administrative functions on the ground that the legislative area of the central government has become too large, and that consequently the general government is not sufficiently in sympathy with local needs and desires.

The problem of centralization in the United States is more than a problem in constitutional law. Legal writers, parading the fetish of state rights, may decry the usurpation of the powers of the so-called sovereign states by the federal government. But in the actual application of federal regulations, beyond being a judicial question, it matters little whether the power to make the regulation was derived by usurpation or expressly granted by the Constitution. Granting that the states of the Union had no powers which they could exercise in a sovereign capacity, but were mere creatures of the federal government with a status similar to that of a

⁸ See Georg Waitz, *Grundzuge der Politik* (Kiel, 1862); Siegfried Bric, *Der Bundesstaat* (Leipzig, 1874); *Ibid.*, *Theorie der Staatenbindungen* (Stuttgart, 1886).

corporation, the fact would still remain that they are distinct social entities, and that a uniform federal regulation that is applicable to one may not be applicable to another. That there are distinct local interests which may serve to handicap the exercise of federal control, irrespective of the constitutional questions involved, is lucidly pointed out by an English observer of American conditions as follows: "Yet even an observer handicapped, as I am, by an alien tradition, can not help but realize that there is in America a certain fundamental disunity of circumstances. When I am in Kansas, I know that I am not in New York. The problems, even the thoughts and the desires, are different and affect people differently. Is it wise to make Washington a kind of Hegelian harmonization of these differences and say that Congress can transcend them in a federal statute? In the result, as every statesman must know, what are called the 'interests of the Republic' in New York will probably be called 'discrimination against the Middle West' in Kansas. And that is intelligible, even if it is rarely praiseworthy. For while action in Kansas would have attempted to cope with the difficulties of the Middle West, action at Washington aims — since a balance of interests must be struck — at their general evasion. Surely this suggests the existence of a problem which has aroused less attention than it deserves."⁹

Professor Freund has observed that "progress towards the unitary state is not an accident but a logical development, once national unity has been attained."¹⁰ The term "national unity," however, admits of a variety of

⁹ Laski, *Problem of Sovereignty*, p. 279.

¹⁰ "The New German Constitution," in *Political Science Quarterly*, XXXV (1920), p. 183.

interpretations. Certainly it is not synonymous with the term "social solidarity" which connotes a stronger bond of fraternity than is possible to realize on a national scale in a country with the geographical dimensions and the diversity of interests that prevail in the United States. About all that national unity can imply is a common language, common traditions, more or less common interests and ideals, and a consciousness of being citizens of the same country. Such a national unity may develop in the course of time, but along with the development of a consciousness of unity there also develops a consciousness of diversity of interests. No one can deny that in the United Kingdom there is more of a common political consciousness than there was during the reign of the Plantagenets, but while the people have developed common interests as Englishmen they have also developed a large number of group interests as churchmen, dissenters, land owners, manufacturers, or laborers. Sectional interests, while less marked than before the advent of modern transportation and communication, are also prevalent. Entire national unity is obviously impossible, and, regardless of how mature a nation is, there will always remain distinct local as well as general national interests.

Even if we limit the meaning of the term "national unity" to the possession of a common language, a consciousness of common citizenship, and a semblance of common ideals, it must be admitted that we have not attained this goal in the United States. The presence of some fourteen million people of foreign birth, to say nothing of the colored population of the South, makes the attainment of national unity exceedingly difficult. Politically the different localities of the United States

are now united by closer bonds than before the Civil War, but with regard to the possession of a common culture or common ideals it is doubtful whether the Americans are any more united now than they were at the close of the Revolution. There are also distinct sectional problems which in local public opinion, because of their proximity and applicability, appear even more important than general national interests. It is not to be expected that Wisconsin, where there is hope of assimilating most of the population, will have the same problems as Georgia, where a large proportion of the population is colored. Nor will a regulation which is applicable to Kansas, which is primarily agricultural, necessarily be applicable to Pennsylvania, which is largely urban and industrial. It is difficult to imagine any large state where local interests are more clearly marked than they are in the United States, and one reason for there not being such a protest against centralization in the United States as there has been in England and France may be that, whereas in England and France the agencies of local control have been reduced to impotence, in the United States there have been opportunities for an effective expression of regional opinion.¹¹

In pointing out that it is difficult to make regulations on a national scale in the United States because of the absence of common ideals it is not intended to imply that public opinion is less alert here than elsewhere. In fact, quite the contrary is probably true. So conservative and keen an observer as Viscount Bryce has been led to remark that public opinion is more alert in the United

¹¹ For an excellent discussion of this problem, see Leon Duquait, *Law in the Modern State* (N. Y., 1919); Laski, *Problem of Sovereignty*, pp. 279 et seq.

States than anywhere else and that it is the ruling power in the nation.¹² An alert public opinion is a dividend a democracy declares at the cost of efficiency. A more autocratic form of government where efficiency is the watchword is not adapted to the development of a vigilant public opinion. However, in the United States the exuberance of youth manifesting itself in a desire to attempt new things is probably as much of a factor in determining the awakened interest in public questions as is the form of government. In another connection Viscount Bryce comments on the uniformity of American life.¹³ There is a remarkable uniformity with regard to custom, dress, and habits of life in general. But this uniformity does not always extend to public opinion. Public opinion is more often local than national. It may be firmly fixed or strongly aroused in one state over a question which has hardly attracted a passing interest in another state. The question of segregation of colored people has never received much consideration in Wisconsin, but in Georgia it has a real meaning.¹⁴

The very alertness of public opinion in the United States may be a hindrance rather than a help to centralization of governmental functions. Most important questions vary in their application in different states. What is desirable in some is not acceptable in others. In national regulation there is always a danger of a relentless majority of the states imposing its will upon other states on a question that has not the same mean-

¹² *Modern Democracies*, II, p. 112.

¹³ *American Commonwealth*, II, Chap. 116.

¹⁴ For a discussion of public opinion, see Charles H. Cooley, *Social Organization* (N. Y., 1912), Chap. 12; A. Lawrence Lowell, *Public Opinion and Popular Government* (N. Y., 1913); Albert V. Dicey, *Law and Public Opinion* (London, 1905); Walter Lippmann, *Public Opinion* (N. Y., 1922).

ing in different localities. Discussing the question of national constitutional prohibition, Mr. Wayne B. Wheeler, national Attorney and General Counsel of the Anti-Saloon League of America, said, "It was difficult to secure, but it is as difficult to repeal. A majority of one branch of the legislature in thirteen states can prevent its repeal. The dry forces control both branches of the legislature in over thirty states under state prohibition. The advantage of this situation is manifest."¹⁵ While this situation is considered favorably by the friends of national prohibition as safeguarding a worthy cause such as temperance, it is also important as illustrating that national control makes possible the tyranny of the majority, and, if the control is established by constitutional amendment, it even makes possible the tyranny of the minority. It also imposes upon the national government the difficult task of enforcing the regulation in large areas which are not in sympathy with the legislation and where violation rather than enforcement is encouraged. It is significant that when the Volstead Act was enacted, ten states containing a large proportion of the population of the United States refused to coöperate with the federal government in the enforcement of national prohibition, and Mr. Wheeler notes that "in such states the law has only about half a chance." Such a situation places the national government in the embarrassing position of not being able to enforce its laws — a situation which breeds disrespect for the law and for the government that seeks to enforce it.

Perhaps what makes the enforcement of federal liquor laws especially difficult is that prohibition is a standard adopted under an agitated and abnormal condition of the

¹⁵ *Current Opinion*, LXX (1921), p. 35.

public mind created by war psychology and prematurely imposed. This leads us to a consideration of another phase of the subject of legislative areas and centralization, namely, the question of legislative experimentation. The American people, especially in the West, are possessed of a pioneer spirit which manifests itself in attempts to try new things. The rapid growth of the country has demanded frequent readjustments. There has been a danger of the rapid economic transformation outstripping the formulation of such legislative policies as the exigencies demand. Consequently, in the last few years, there has been much legislative experimentation, and by a process of trial and error the states are learning how to cope with new conditions. Such legislative experiments obviously would be inconvenient, if not frequently disastrous, if attempted on a national scale. But when conducted by the states the experience of one may be helpful to the others. Professor Ross clearly points out this advantage from the viewpoint of the sociologist when he says, "It is fortunate that the large number of commonwealths in the American Union permits one state to experiment for the other forty-seven. One state or another makes a new departure in the way of a minimum wage for women, abolition of private employment bureaus, 'mothers' pensions,' the 'social evil,' probation for adult first offenders, the juvenile court, municipal ownership, factory sanitation, the surgical sterilization of degenerates. Other states watch eagerly the results of the experiment and follow suit if the results are encouraging."¹⁶ Chief Justice Taft, writing from the viewpoint of a student of government, in even more emphatic terms, urges the advantage of trying out reforms on a small

¹⁶ *Principles of Sociology* (N. Y., 1920), pp. 550-551.

scale when he says, "There is a great advantage in having different state governments trying different experiments in the enactment of laws and in governmental policies, so that a state less prone to accept novel and untried remedies may await their development by states more enterprising and more courageous. The end is that the diversity of opinion in state governments enforces a wise deliberation and creates a *locus poenitentiae* which may constitute the salvation of the Republic."¹⁷

Such an opportunity for experimentation makes it possible for the states to deal with contested and immature standards in legislation until a stabilized public opinion is formed. A state by experimenting may learn what to retain and what to eliminate. Other states can then accept the legislative policy and modify it to suit local conditions. This works for progress built on a sound foundation, and is one of the strongest and most practical vindications of our system of division of powers.

One of the principal factors that makes for the success of governmental experiments in the states is that these experiments are undertaken by men who are vitally interested in the results to be obtained. It is only natural for men to be interested in their immediate surroundings. A Wisconsin legislator is interested in "filled cheese" legislation, but has little or no interest in problems connected with the marketing of cotton. National legislation, which concerns only localities here and there, or which affects different sections with varying degrees of intensity, is always in danger of being enacted by legislators who are out of sympathy with the problems involved. Such a situation invites, not only indifferent legislation, but, because of the interests of congressmen

¹⁷ *Popular Government*, p. 155.

in their home districts, it encourages the practice of log-rolling. A member of Congress from Wisconsin may desire national legislation on dairy products, a subject that perhaps does not interest a member from Georgia. But he may secure the support of the Georgia member by promising to support cotton legislation, a subject in which the Wisconsin representative is not interested. The pernicious influence of local interests in such national projects as rivers and harbors legislation and national conservation is notorious. Congressmen have favored national expenditures in their local districts, not because the improvement was more beneficial there than elsewhere, but because their interest in their home community was stronger than their desire for the general welfare of the United States. The national improvement might be out of place in a particular locality and of little value, but it was paid for out of the federal treasury and therefore did not cost the district a great deal. It is very difficult in a large country like the United States to arrive at a satisfactory legislative policy which influences localities differently when the legislators are primarily interested in their local districts. This difficulty of extending the functions of the national government so as to include matters usually handled by the states was clearly pointed out by Mr. Bryan when he was a candidate for the presidency in 1908: "Not only would national legislators lack the time necessary for investigation, and therefore lack the information necessary to wise decision, but the indifference of representatives in one part of the country to local matters in other parts of the country would invite the abuse of power. Then, too, the seat of government would be so far from the great majority of the voters as to prevent the scrutiny

of public conduct which is essential to clean and honest government. The union of the separate states under a federal government offers the only plan that can adapt itself to indefinite extension.”¹⁸ In countries like England or France where, due to custom and tradition, national and industrial interests take precedence over local interests in the national parliament, it may be possible to have a fair consideration of questions affecting local communities. In the United States where a Congressman represents a geographical district, his action in Congress will be marked by either too great a zeal for his own state and district or by his lack of interest in other places. Under such conditions it is wiser to leave interests of local concern to the states and retain only those of national concern for Congress.

The national government, during the first half century of its existence, concerned itself mainly with problems that by their nature were national in scope and character. With the advent of modern business enterprise with its manifold ramifications, the problems that were of national concern necessarily increased and the federal government was compelled to shoulder additional burdens. To load it with duties that can feasibly be performed by the different state governments may lead to overtaxing the national government and a resultant decline in its efficiency. It was the opinion of Madison that the strongest argument in the Federal Convention for preserving the individuality of the states was that the “General Government could not extend its care to all the minute objects which fall under the cognizance of the local jurisdiction.”¹⁹ That there is still weight to

¹⁸ *Central Law Journal*, LXVII (1908), p. 273.

¹⁹ *Madison Papers*, II, p. 924.

this argument is shown by the amazing volume of work performed by such centralizing agencies as the Interstate Commerce Commission.

However, it is not merely the volume of the duties that makes a centralized administration difficult, but what is equally important is that the personnel in federal administrative positions is apt to be too far removed from the people who are affected by the regulations. This has its influence, not only on the attitude of the government, but upon the governed as well. There is always a danger of an administrative commission becoming bureaucratic in its methods if it is too far removed from the people who are affected by its regulations. Burdened with many duties, it must systematize its work adapting more or less fixed standards, and thus it loses the personal touch and its work becomes more or less routine.

Having the government too far removed from the people also tends to have a depressing influence upon the people themselves. With all their faults the states have served remarkably well as areas of legislation and administration. Americans from colonial times have habitually considered the states as legislative and administrative units. The people of a state are vitally interested in its legislative and administrative policies. They subconsciously feel that these policies, in a way, are *theirs* and for this reason they submit to them more readily. There is also a feeling that the government is not too far removed, and if a statute or an administrative order affects one adversely he can immediately make his grievance known to his representative or to the administrative commission and may expect and receive a reply within a reasonable time. He feels that

this is his privilege, and since he can exercise it he is not so likely to digest a grievance against the government of the state. The administrative commission is also helped by this situation since it is not permitted to lose its human interest and deteriorate into a mere mechanism of government.

Such intimacy between the government and the governed is not possible with a centralized control at Washington. There is not that direct control which is possible only in smaller areas. The citizen in his dealing with the government is vexed with inconvenient delays. The government, in attempting to handle innumerable minute things, becomes mechanical, and the more mechanical a government becomes and the less able it is to deal directly with the people, the more danger there is of its becoming entangled in a mesh of red tape. It is not accidental that red tape is notorious in large states where central control of local interests is practiced. The governmental functions become so numerous that personal supervision is hopeless, and in their efforts to forestall corruption, administrators bring on a complicated procedure that makes prompt and direct action impossible. Le Bon cites an instance in France where an officer who, having received permission to have made for him at The Hotel des Invalides a pair of non-regimental boots, found himself indebted to the State for the sum of 7 fr. 80, which he was willing to pay. To render the payment regular there was necessary three letters from the Minister of War, one from the Minister of Finances, and fifteen letters, decisions, or reports from generals, directors, chiefs of departments, etc.²⁰ Similar instances may

²⁰ Gustave Le Bon, *The Psychology of Socialism* (N. Y., 1899), p. 176, quoted by Ross, *Principles of Sociology*, p. 303.

be found in England. In Russia, under the central supervision of the Tsarist government, the situation was tragic.²¹

Viscount Bryce has defined Democracy as meaning "nothing more or less than the rule of the whole people expressing their sovereign will by their votes."²² This describes a democracy as a form of government, as dis-

²¹ Wallace cites the following ridiculous procedure in Russia: "In a residence of a governor-general one of the stoves is in need of repairs. An ordinary mortal may assume that a man with the rank of governor-general may be trusted to expend a few shillings conscientiously, and that consequently his Excellency will at once order the repairs to be made and the payment to be put down among the petty expenses. To the Bureaucratic mind the case appears in a very different light. All possible contingencies must be carefully provided for. As a governor-general may possibly be possessed with a mania for making useless alterations, the necessity of the repairs ought to be verified; and as wisdom and honesty are more likely to reside in an assembly than in an individual, it is well to intrust the verification to a council. A council of three or four members accordingly certifies that the repairs are necessary. This is pretty strong authority, but it is not enough. Councils are composed of mere human beings, liable to error and subject to be intimidated by the governor-general. It is prudent, therefore, that the decision of the council be confirmed by the procureur, who is directly subordinated to the minister of justice. When this double confirmation has been obtained, an architect examines the stove and makes an estimate. But it would be dangerous to give *carte blanche* to an architect, and therefore the estimate has to be confirmed, first by the aforesaid council and afterwards by the procureur. When all these formalities—which require sixteen days and ten sheets of paper—have been duly observed, his Excellency is informed that the contemplated repairs will cost two roubles and forty kopeks, or about five shillings of our money. Even here the formalities do not stop, for the government must have the assurance that the architect who made the estimate and superintended the repairs has not been guilty of negligence. A second architect is therefore sent to examine the work, and his report, like the estimate, requires to be confirmed by the council and the procureur. The whole correspondence lasts thirty days and requires not less than thirty sheets of paper. Had the person who desired the repairs been not a governor-general, but an ordinary mortal, it is impossible to say how long the procedure might have lasted." Sir Donald M. Wallace, *Russia* (Rev. Ed., N. Y., 1905).

²² *Modern Democracies*, I, Preface, p. viii.

tinguished from other forms. But Democracy is more than a form of government. It is an ideal. The feeling among the citizens that the government is *their* government in which they have a vital interest is the soul of a democracy. Where the government becomes too far removed, the interest of the people in their government begins to wane because other interests nearer to them take precedence in their minds. It is difficult to see how Democracy in government can remain a vital thing unless the individuality and autonomy of local governmental institutions is retained in which people can take an interest, where they can have personal contact with the leaders, and where they can see the actual results of Democracy. Without this the *demos* becomes disinterested, and a democracy with a disinterested *demos* is probably less fortunate than a despotism with a benevolent despot.

That centralization in large states is not adapted to meet the requirements for governmental supervision that modern industry entails is indicated by the protests against centralized control in those countries where the powers of the local units are but a reflex of the central power. In the United Kingdom the attempt to reconcile centralized control with a degree of local autonomy has been an ever-recurring problem in legislation during the last century. From the time of the Plantagenets to our own day, centralized control was jealously guarded in the British Empire. But it is significant that the last half century has witnessed a tendency towards decentralization in the Empire. Not only have the dominions and Ireland been given home rule, but there has been an agitation for separate parliaments in England, Scotland and Wales. There are also advocates cham-

pioning the cause of a greater sphere of autonomy for the local units. The adoption of some scheme of "devolution" has been urged for years. The arguments in favor of such a plan are not based on mere theory, but on practical political experience. Centralization in government, as well as in business organization, has its limitations beyond which it cannot be carried without a sacrifice of efficiency and without being conducive to resentment or indifference in local areas. Functional devolution, or the setting up of one or more separate national bodies charged with control over certain classes of subjects in order to relieve Parliament, has been suggested. This, however, has not been put into practice. Territorial, or regional, devolution is seriously considered. Parliament, however, has been loath to relinquish any of its powers which it has attained after centuries of struggle. Consequently there is a delegation of functions rather than of powers, and, with regard to smaller local units, the tendency seems to be to strengthen the centralized control. But there are those, like Mr. Laski, who are pleading for a real local autonomy on the ground that only in this way can an interest in local government be aroused.²³

In France, likewise, proposals looking to differing degrees of decentralization have been made. Some writers have seriously urged the suppression of the prefectural

²³ On the various phases of the subject of decentralization in England, see Frederic A. Ogg, *Governments of Europe* (Rev. ed., N. Y., 1920), pp. 201-205; R. Roberts, "England in Revolution," in *N. Y. Nation*, May 17, 1919; A. F. Dicey, "Thoughts on the Parliament of Scotland," in *Quar. Rev.*, April, 1916; J. A. R. McDonald, "Devolution or Destruction," in *Contemp. Rev.*, Aug., 1918; Basil Williams (ed.), *Home Rule Problems* (London, 1911), Chapter X; Harold J. Laski, *Studies in the Problem of Government* (New Haven, 1917), Appendix A and B.

office which is the cornerstone of centralized control.²⁴ It has also been advocated by a number of prominent French scholars that the country should be divided into "regions" which should be given more autonomy than local units now enjoy. It is hoped by the advocates of this scheme that if these regions are laid out with regard for historical associations and physical unity there may develop in these areas a self-consciousness and a vitality which is lacking in the purely artificial departments.²⁵

The movements for "devolution" in England and of "regionalism" in France will probably not bear fruit in the establishment of federal systems. Federalism is not welcome in countries that have witnessed the baneful effects of provincial strife. But the movement nevertheless is significant as an attempt to relieve the congestion in the central government and also to furnish local areas an opportunity to develop a regional self-consciousness. Final power would be vested in the central government, but this would probably come to be exercised with less frequency, and the exercise of constitutional powers is more important than the mere possession of authority. A somewhat similar arrangement

²⁴ H. Chardon, *Le Pouvoir administratif* (New ed., Paris, 1912), Chap. IV.

²⁵ For a discussion of the various phases of the subject of decentralization in France, see Ogg, *Governments of Europe*, pp. 480-83; Duquit, *Law in the Modern State*, Chap. IV; J. W. Garner, "Administrative Reform in France," in *Amer. Pol. Sci. Rev.*, Feb., 1919; J. T. Young, "Administrative Centralization and Decentralization in France," in *Ann. of Amer. Acad. of Pol. and Soc. Sci.*, Jan., 1898; C. Beauquier, "Un projet de réforme administrative: l'organisation régionale en France," in *Rev. Pol. et Parl.*, Nov., 1909; Vidal de la Blache, "Régions françaises," in *Rev. de Paris*, Dec., 1910; L. B. Baucherau, "La réforme administrative après la guerre — le régionalisme," in *Rev. Pol. et Parl.*, Aug., 1918; M. Hauriou, *La décentralisation* (Paris, 1893); P. Deschanel, *La décentralisation* (Paris, 1895).

is planned in the new German Constitution ²⁶ by which the general government is given final authority, but under which it is supposed to limit itself to laying down general principles, leaving the details of the legislation to the states.²⁷

In connection with protests against centralization the subject of pluralism may also be mentioned. The pluralistic state presupposes, not so much a division of a centralized government into so many more or less autonomous local units, as a modification of the whole structure of the state. It emphasizes the development of governmental authority based on economic interests rather than on territorial boundaries. It is thus functional rather than geographical, and societarian rather than political. The program of pluralists is as yet vague and ill-defined. The movement is reflected in Russia by sovietism, in England by guild socialism, and in France by syndicalism. While the concept of pluralism is vague, the movement itself is worthy of notice.

Pluralism is probably the outgrowth of modern industrial methods which encourage association on lines of economic interests and thus create a number of groups with distinct interests to which the individual owes more or less allegiance. This is lucidly pointed out by Duquitt: "Every modern country, and very notably France, is a mass of groups. We have associations, federations of

²⁶ W. B. Munro and A. N. Holcombe (translation), "Constitution of the German Commonwealth," in *League of Nations*, Dec., 1919, Arts. 10, 11.

²⁷ The word "decentralization," which is apt to imply a division of power as well as a division of governmental functions, has here been used rather freely as describing the movement in England and France. A delegation of autonomous power is not seriously considered. Consequently the word "deconcentration," used by some writers, more accurately describes the movement in some of its phases.

associations, trade unions, financial companies, industrial companies, mining companies, insurance companies, public contractors. Each constitutes a social group with its own law of life. The theory of the modern state is therefore compelled to adapt itself to the existence of these powerful groups. It must determine a method of their coördination. It must settle their relations with the government that exercises public power.”²⁸ The pluralists contend that these groups, rather than the present political state laid out on geographical lines, will determine the social organization of the future. To use again the language of Duquít: “Prophecy may be a dangerous adventure, but the immense development of group life in every field of social activity seems so general, so spontaneous, and so characteristic of our time as to demand the admission that it contains at any rate the elements of the social organization of the future. Already our law has ceased to be based on the idea of a unified and indivisible sovereignty. It is and it will be an objective law of government; but it is the law of a government which does not command. It is the law of a government which serves the public need and secures the coördination of the modern corporate life.”²⁹

Pluralism, while it is not a direct protest against centralization, is not entirely dissociated from the movement for decentralization. Centralization of governmental control, with its tendency to remove the government farther from the governed, has undoubtedly had some influence in shaping the pluralistic concept of the state. Pluralism, like the program for local autonomy, is an attempt, perhaps an unconscious attempt, to re-

²⁸ *Law in the Modern State*, pp. 116-117.

²⁹ *Ibid.*

vivify government. A government far removed from the people is apt to appear impersonal and abstract. It may not appear as vital and real to a laborer as his local trade union or syndicate. The government may not receive the same fidelity from the French Syndicalist that his syndicate receives. The government cannot reach him with the same appeal, that of mutual sympathy. But would this be true of the workingman of the Canton of Glarus who meets together with his neighbors in the *Landsgemeinde* and has a direct influence in shaping governmental policies? Is it an accident that the pluralistic idea has found its most fertile soil in countries like England, France, and Russia where there is the least regard for local autonomy? ³⁰

In the United States the declamations against "Federal Usurpation" have been more or less sentimental. "State's Rights" has been a happy phrase to conjure with. The protests against centralized control have been based mainly on the argument that the federal government has overstepped its enumerated powers and invaded the jurisdiction of the states. While the question of constitutional powers is important it is not so pertinent as the question of a wise exercise of those powers. In preceding chapters an attempt has been

³⁰ For a recent excellent discussion of pluralism, see Francis W. Coker, "The Technique of the Pluralistic State," in *American Political Science Review*, XV (1921), pp. 186-213. The literature dealing with the subject more or less directly is quite extensive. Among the titles might be mentioned George W. H. Cole, *Guild Socialism* (London, 1920); Harold J. Laski, *Problem of Sovereignty*; *ibid.*, *Authority in the Modern State* (New Haven, 1919); Leon Duguit, *Law in the Modern State*; George Sorel, *Reflections on Violence* (trans. by T. E. Hume, N. Y., 1912) gives a good brief discussion of the subject of syndicalism. For an excellent philosophical interpretation, see George H. Sabine, "Pluralism: A Point of View," in *Amer. Pol. Sci. Rev.*, XVII (Feb., 1923), pp. 34-50.

made to point out that through enumerated powers liberally construed the federal government is clothed with vast authority. If it seeks to exercise all the powers conferred by such constitutional provisions as the commerce clause and the taxing clause, Congress is courting difficulties, just as the British Parliament would get into difficulties if it injudiciously sought to exercise its powers over the self-governing dominions. Some line therefore must be drawn between interests which inherently are national and those matters that can best be left to the several states.

The railroads might be cited as an example of an industry that by its very nature lends itself to a unified centralized control rather than to the diversified and often conflicting regulations of the different states. The railroads are the arteries of trade uniting the different regions of production and connecting the producer and the consumer. A stoppage of transportation, even if confined to one region, is apt to be felt by the whole country. Regional interests are not bounded by arbitrary state lines, and the railroads are vitally associated with these different interests throughout the United States. Consequently the railroads are of national concern and the jurisdiction of the controlling agency must necessarily be broader than that afforded by the states. National regulation is thus justified by the nature of the interests controlled as well as by constitutional provisions.

However, while national control over railroads may be essential, this does not do away with the difficulties that centralization necessarily entails. The increasing volume of the business of the Interstate Commerce Commission may eventually make necessary some sort of a decentralization without a sacrifice of federal power. Some

organization similar to that of the federal courts may have to be established in such national administrative agencies as the Interstate Commerce Commission. The organization might provide for sub-commissions located in each state, and for regional commissions located at strategic commercial points and with jurisdiction over an area laid out with regard for economic interests. The commission at Washington would then serve as a central coördinating agency and would consider appeals from the subordinate commissions. Such an arrangement would tend to relieve the congestion of business in the central agency, would bring the controlling agency nearer to the persons affected by its regulations, and would thus establish a better understanding between the government on the one hand and the governed on the other.³¹

While regulation of transportation appears to be more satisfactorily administered under federal control, "morals" legislation, on the other hand, can probably be more advantageously left to the different states. The average individual may consider prevailing railroad rates unfair, but he does not consider them as infringing his personal liberties — a reaction which often takes place in the case of morals legislation. What constitutes a just and reasonable railroad rate is a technical question on which it is difficult to find a true expression of public opinion. But there is a general popular reaction against discriminating rates. Such rates offend the popular sense of fair play. A national public opinion cannot be formed with regard to the technical operations of railroads, but it may be formed with regard to certain

³¹ It is becoming the practice of such agencies as the Interstate Commerce Commission and the Federal Trade Commission to hold hearings in important centers. The establishment of adequate subdivisions, however, has not been effected.

practices, at least to the extent of trusting a national umpire to enforce the rules of the game. But with morals legislation the situation is somewhat different. Morals legislation implies that the state shall determine what is good for the individual, and the individual is apt to have a strong conviction that he knows what is good for himself. The average individual affected by such legislation as prohibition does not view the regulation in its bearing upon society at large, but is likely to consider it as a restriction upon his freedom. Such a regulation is more personal than a regulation of railroad rates and he reacts differently to it. The extension of federal power over the railways, including local rates, has been calmly viewed by the American public. National prohibition, on the other hand, has raised a storm of approval and protest. This is not accidental. The regulations are essentially different in their application and reception.

Morals legislation has a peculiar status in the United States. The German ideal in law making has been that simple rules should be laid down and explicitly enforced with military precision. An entirely different ideal seems to prevail in the United States where statutes are often certificates of officially accepted standards of conduct rather than rules to be enforced. These statutes are apt to be too ideal and do not allow for human weaknesses and, while the penalty prescribed is often extreme, it is also likely to indicate merely the indignation of the legislator and is rarely applied. Such legislative practices probably result from what sociologists have termed "ethical dualism"—a willingness on the part of an individual to prescribe for society a standard of conduct which he is not ready to accept personally as

governing his own actions. Legislation of this kind obviously is of value in educating public opinion to disapprove of practices which the legislative body has condemned. But if public opinion is not ready to accept these standards it becomes difficult to enforce them. Standards of conduct can be enforced more readily in local areas where some unity of public opinion may be realized, where the rules imposed may be modified to fit changing conditions, and where the people are near enough to the government to feel that the restriction is self-imposed and not forced upon them by a superior authority.

In modern industrial society, a locality, in order to compete with other localities, is compelled to adjust itself and to adopt the prevailing means of production. No such economic pressure is brought to bear on moral standards and consequently these may become more or less localized. Due to Continental influences as distinguished from Puritanical influences, Sunday closing laws are more lax in the North and West than in the East and South. Standards of conduct also tend to change. In colonial times the liquor traffic and lotteries were recognized as legitimate callings, but amusements, such as the theatre, were under the ban. At present the contrary is true. Since moral standards are apt to become localized and since they are subject to change, it is precarious for Congress to attempt morals legislation for such a vast area as the United States.

Occasionally a fairly unified public opinion on a national scale may be formed with regard to some specific subject of morals legislation. The recent liquor legislation is a case in point. The colonial trade with the West Indies brought in rum and molasses and because of the

consumption of hard liquor the traffic became associated with drunkenness. The consumption of hard liquors continued with the migration to the West. In the South the liquor question became associated with the race problem. In the agricultural West it was associated with excesses. As in other countries, such as Russia, Finland, and Scandinavia, where hard liquor and drunkenness were common, a temperance reaction set in, and owing to war conditions it reached such proportions that national constitutional prohibition was imposed. Whether this can be enforced remains to be seen. That at the time of the adoption of the Eighteenth Amendment eighty-eight per cent of the total area of the United States containing sixty-one per cent of the population ³² had already adopted prohibition by local option augurs favorably for federal enforcement. However, it cannot be said that a unified public opinion exists with regard to the enforcement of liquor laws, and the most ardent friends of prohibition admit these laws cannot be rigidly enforced without the concurrence of the states.

The establishment of temperance and the abolition of child labor are admitted to be worthy causes and it may reasonably be argued that where the national thought is superior to state thought, where it is temporarily in advance, the states should be dominated by this thought. Such an argument holds for the realization of an ideal. But will it hold when the question is one of actual legislation and law enforcement? A relentless majority filled with a zeal for reform are wont to urge that the central government become the agency for enforcing the reform. Such a program can only lead to the fed-

³² These figures are taken from the *Literary Digest*, LXVIII (1921), p. 11.

eral government undertaking tasks which could be more happily performed by the states.³³

In the exercise of its constitutional powers, the federal government has confined itself, in the main, to regulating matters which are national in character. In spite of the declamations against federal usurpation of state powers it must be said that, on the whole, Congress has not frequently attempted to regulate matters that could be more advantageously handled by the states. But what is regrettable is that there has been no studied attempt to establish a line of demarcation between federal functions and state functions. Much has been written, in an academic way, on the subject of the division of powers in the American constitutional system. But there has been no serious attempt to establish a working compromise between the federal government on the one hand and the states on the other. Each has gone on in a more or less haphazard fashion regardless of the operations of the other. Consequently there has been an overlapping of functions and a duplication of efforts. The lines of demarcation have never been made plain. Modern industrial society, with its complexities, requires more and more governmental activity. Both the federal government and the states are overcrowded with business. Neither can afford to waste any energy in duplicating the work of the other. The problem of federalism in the United States, adequately stated, is not so much a question of division of powers as it is a ques-

³³ See editorial "Prohibition as a Warning," in *The New Republic*, Jan. 25, 1919, pp. 359-61. It is important to observe in this connection that, according to Professor Freund, "factory laws began everywhere with the legislation of child labor, and that that legislation always went hand in hand with efforts to secure to the child some measure of education and instruction." *Standards of American Legislation*, p. 26.

tion of division of labor. The possibility of coöperation between the central government and the states must be considered and a clearer allotment of functions must be made. With the increase of governmental business some sort of working compromise, based upon the idea of an intelligent division of labor rather than upon the idea of division of power, should be established between the national government and the states. The basis for such a compromise was laid down by James Wilson when, in urging the adoption of the Constitution, he declared: "Whatever object of government is confined in its operation and effect within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States."³⁴

It will be observed that this statement of James Wilson regarding the division of powers of our constitutional system, in its final analysis, is based on functional rather than *a priori* considerations. It is also significant to note that he was a leader in the Federal Convention. What appeared to be uppermost in Wilson's mind was to delineate, not so much the powers, as the respective functions of the federal government and the states. In the Constitutional Convention he had sided with Madison, taking the view that the central government should be given extensive powers because subsequent experience would show what functions could be most advantageously performed respectively by the federal government and the states. Subsequent experience has revealed the sound-

³⁴ Address to Convention of Pennsylvania, *Elliot's Debates*, II, p. 424.

ness of Wilson's statement. His generalization may be taken as a basis for an intelligent division of labor between the federal government and the states. There must be no twilight zone where neither the central government nor the states have jurisdiction. But an overlapping of jurisdiction with the possibility of duplication of activities is apt to have serious consequences. Therefore a theory like that advanced by James Wilson must be enlarged upon and made more real by studied attempts to put it into practice.

Irrespective of constitutional provisions, it appears logical, as Wilson contended, that those objects of government which extend in their "operation or effects beyond the bounds of a particular state should be considered as belonging to the government of the United States." That the control of foreign affairs is an exclusive federal function has never even been seriously questioned. The power of controlling foreign commerce is essentially associated with such other federal powers as the treaty-making power, war power, and control of foreign affairs in general. For this reason foreign commerce can be regulated advantageously only by the central government. In the regulation of interstate commerce, however, some lines of demarcation must be drawn between what logically should be regulated by Congress and what should be left to the states. The means and agencies of transportation naturally require uniform federal regulation. For example, a uniform type of coupler is absolutely essential because cars are hauled as parts of both local and interstate trains. The railroads as a whole require uniform federal regulations. But deconcentration of federal control may be necessary and sub-commissions may have to

be established in order that local problems may receive sufficient attention from an administrative commission that is acquainted with local conditions. Railroad rates, because of the nature of modern railway transportation, can be regulated more advantageously by Congress than by the states. Experience has shown that state regulations on the question of rates are apt to be conflicting and discriminatory. This is indicated by the Shreveport Case where it was shown that a state was actually discriminating against interstate commerce in order to promote local business. A fair rule can be determined only by a consideration of the entire business of a railroad, and by its services in different sections. The actual routing of passengers and freight may also be necessary on a national scale, as was shown during the recent war, in which event it is necessary that this power be vested in the central government.

While the means and agencies of transportation inherently require federal control, such a control to a certain degree may be necessary over the subjects of interstate commerce. Because of the concentration in certain sections of the country of industries engaged in the production of food for human consumption, it may be necessary for Congress to provide against the transportation of fraudulent or injurious products in interstate commerce. A packing industry in Chicago sends its products into every state of the Union. Its business extends beyond the borders of any state, and a general control by the federal government becomes necessary. For a similar reason congressional control of large business combinations may be justified on the ground of expediency. Their business is interstate. This would even hold true for labor organizations when by their

activities they actually interfere with interstate commerce.

Morals legislation, on the other hand, does not inherently lend itself to congressional action. Neither does such legislation as labor laws, domestic relations, and a vast amount of regulations with which the states are concerned. Most of this legislation is modified to suit a local public opinion. Where there is actual need of uniformity, as in the law of negotiable instruments, the tendency is for such a uniformity to be established in the different states because of the realization of the necessity, regardless of any regulation imposed by the federal government. It is exceedingly difficult for Congress wisely to enact legislation of this kind. Congress is already burdened with matters that require federal control. If it attempts to regulate matters which can be more advantageously handled by the states, the legislation which is distinctly federal in character will necessarily suffer. Such a program would weaken rather than strengthen the position of the federal government. Congress would also be out of sympathy with local public opinion and consequently the legislation would not receive the attention that it merits. The greatest difficulty, however, to congressional legislation of this kind would probably be the spirit in which the regulation would be received by the people concerned. Feeling that they have had a part in making the regulations, people will submit more readily to local restrictive legislation. But if the regulations are made by Congress, which is far removed from local interests, they are apt to be resented as being superimposed. Violations of these regulations then become justified by a local public opinion. This breeds a disrespect for federal law and for the government that attempts to enforce it.

In seeking to saddle the federal government with the responsibility of carrying out such reforms as child labor legislation and improvement of educational facilities, reformers are apt to point to conditions in the more backward states as glaring examples of the inadequacy of state control. Too often they overlook conditions in the more progressive states. Federal regulations would probably result in immediate improvement in backward sections, but it is questionable if a reform which is superimposed would be as satisfactory in the long run as one which is self-imposed and has the support of local public opinion. It is not to be expected that the federal government can realize on a national scale the improved social and economic conditions that have been achieved in the more progressive states, and there is a real danger that if the central government assumes the responsibility the state legislators will look upon these reforms as federal functions and thus lose interest in them. The more progressive states have accepted it as their duty to maintain proper conditions within their own households and have enacted and enforced the necessary legislation to improve social conditions. The more backward states must learn this lesson. The states must carry out the functions which inherently belong to them. The central government is too busy to concern itself with matters which the states can handle more satisfactorily, and the states do not have time to give thought to federal functions. If both perform the same functions there is necessarily a duplication of efforts and a sacrifice of efficiency.

The regulations of the federal government in the field of social and economic legislation indicate the tendencies of that government to expand its field of activities. Will it confine itself to regulating matters which inherently

lend themselves to federal regulation, or will it attempt regulations for the promotion of morals, health, safety, and general welfare which by their very nature can be more advantageously handled by the states? It is certain that Congress cannot regulate local matters when it is not in touch with regional opinion and when it is overcrowded with matters of national importance. To do so would be to impair the efficiency of the federal government and thus lower the prestige it enjoys throughout the nation. It must confine itself to national legislation. It is also certain that the states, in order to retain their vitality as local governmental units, must be secure in their jurisdiction against federal invasion. The inviolability of states rights is an essential feature of our constitutional system. To use the words of Lincoln, in his first message to Congress: "To maintain inviolate the rights of the States to order and control under the Constitution their own affairs by their own judgment exclusively, is essential for the preservation of that balance of power on which our institutions rest." The maintenance of distinct spheres of activity respectively for the federal government and the states is more than a question of constitutional interpretation. Even in the absence of a constitution, a workable division of functions would be necessary if we are to enjoy an efficient government which inspires confidence and respect.

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